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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. M. ANANTANARAYANAN, *Chief Justice*, MR. JUSTICE P. RAMAKRISHNAN AND MR. JUSTICE M. NATESAN.

The Chief Controlling Revenue Authority, Madras .. *Applicant**

v.

Messrs. Sudarsanam Pictures, Madras-18 .. *Respondent*

Stamp Act (II of 1899), section 2 (17) and Schedule I, Article 40—" Mortgage deed " under section 2 (17)—Essential elements—Instrument giving right of distribution to financier over a film under production with first charge for realisation of his dues—If " mortgage deed " chargeable to stamp duty under Article 40 or merely an " agreement ".

The definition of a 'mortgage deed' in section 2 (17) of the Stamp Act is wide and extensive and is not limited to immoveable property and the definition is special and introduced for the purpose of the Stamp Act. The mortgage can be even for the performance of an engagement and includes a charge and the definition is of the instrument and not of the transaction. The essential elements required for an instrument to be a mortgage deed under section 2 (17) are (1) there must be a transfer or a creation of a right over, or in respect of a property by the instrument and (2) it must be a right over or in respect of 'specified property.' The expression 'specified property' has not been defined under the Act nor the expression 'transfer'. The expression 'property' has therefore to be taken in its widest amplitude, comprehending in its scope every possible interest which a party can have, capable of transfer or being subjected to rights.

Under the Transfer of Property Act, it is settled law that while a transfer of property may take place not only in the present, but also in the future, the property must be in existence at the time of the transfer, for an instrument to be a deed of transfer. The conveyance may be in present or in future, but the conveyance should be of property in existence. A purported transfer of property, not in existence at the time of the contract, can only operate as a contract to be performed in future. The principles that govern the construction of the word 'transfer' in relation to property under the Transfer of Property Act, would equally apply to the transfer or creation of right provided under the definition of 'mortgage deed' in section 2 (17) of the Stamp Act.

* R.C. No 2 of 1966. 31st March, 1967

The Second ingredient for an instrument to be a mortgage deed under section 2 (17) of the Stamp Act is that the property should be 'specified property'. Property may be considered to be 'specified' if it is clearly defined so that there may be no difficulty in its identification Non-existent property cannot be considered to be clearly defined so that there may be no difficulty in its identification

Thus, where by an instrument a film producer raised finance for a film under production granting distribution rights in specified territories to the financier, *i e*, the distributor, the instrument securing to the distributor the realisation of his advance by covenant providing for delivery of positive prints of the picture and further providing that the distributor shall have first charge over the prints and the distribution, exhibition and exploitation rights of the picture till the amounts due to the distributor were fully discharged,

Held, the instrument was only an 'agreement' and not a 'mortgage deed' chargeable to stamp duty under Article 40 of Schedule I of the Stamp Act as there could have been no transfer or creation of right in or over property at the time of the execution of the instrument, when the film was only under production.

Case referred to the High Court by the Chief Controlling Revenue Authority Madras, under section 57 of the Indian Stamp Act, 1899 in the matter of an instrument by M/s. Sudarsanam Pictures, Madras.

The Additional Government Pleader, for Referring Authority.

R. Janarthana Rao, for Respondents as *Amicus Curiae*

The Judgment of the Court was delivered by

Natesan, J—This is a reference by the Chief Controlling Revenue Authority, Madras, under section 57 of the Indian Stamp Act, 1899 for our opinion whether the instrument in question is a mortgage with possession coming under Article 40 (*a*) of Schedule I of the Indian Stamp Act or an agreement

The instrument styled as an agreement is the record of a transaction common in the film trade, wherey the film producer raises finance for a film under production by granting distribution rights in specified territories to the financier termed, the distributor. The instrument secures to the distributor the realisation of his advance by covenants giving him specified rights over the film It generally specifies the title of the film and also names of prominent artists, featuring or expected to feature in the film The instrument in question under consideration has been entered into by Messrs Sudarsanam Pictures, Film Producers, with Messrs. Gee Pictures (P) Ltd., film distributors, in respect of a Tamil talkie entitled 'Aval Yar' The document provides for the advance of a sum of Rs 50,000 by the distributors to the producers, the amount to be paid in four instalments, the final instalment, a sum of Rs 20,000, being payable against delivery of the prints, that is, positive prints for exhibition The producers grant to the distributors the exclusive rights of exhibition, distribution and exploitation of the picture in specified territories for a period of five years Mutual covenants are found for the protection of the respective interests of the producer and the distributor There is provision for the distributor having commission on the realisations from the exhibition of the film The operative part of the instrument material for our purpose is found in the following clauses.

"The producers hereby grant the distributors the exclusive rights of exhibition, distribution and exploitation of the said picture for the area referred to herein above for a period of five years from the date of its first release in the said area. The producers shall deliver to the distributors three positive prints of the said picture for distribution, with three sets of photo cards, three sets of enlargements, three sets of slides and other loan publicities The producers shall subject to availability of raw stock prepare and supply to the distributors as many extra prints as the distributors may require for which the distributors shall advance to the producers the necessary amounts towards the cost of the prints and debit the

amount to the account of the producers.. . The distributors shall have the first and paramount charge on the net realisations. The distributors shall be entitled in the first instance to appropriate themselves the commission due to them from the realisations The balance of the net realisations shall thereafter be appropriated towards the recovery of all advances made by the distributors. When all the advances and payments made by the distributors, shall have been recovered as aforesaid, the distributors shall every month remit the net realisations less their commission on or before the 15th of the succeeding month. The distributors shall furnish monthly statement of account of realisations to the producers. .... The distributors shall have the first charge over the distribution, exhibition and exploitation right of the said picture for the said distribution area, the realisations therefrom and of the copies of the picture supplied hereunder until the amount due to the distributors is fully discharged. . . on the expiration of the period of distribution the distributors shall return to the producers all the prints of the said picture along with the loan publicities in the then existing conditions If within one year from the date of the first release of the said picture, the amounts advanced by the distributors are not fully collected the producers shall be entitled to repay to the distributors the amounts standing to their credit"

This document is signed by the producers and the distributors It bears stamp as an agreement and is not attested

The learned Additional Government Pleader appearing for the Chief Controlling Revenue Authority, contends that the instrument is a mortgage, and a mortgage with possession in fact falling under Article 40 (*a*) of the Stamp Act. He stresses on the covenant in the instrument providing for delivery of positive prints of the picture to the distributors and the covenant that the distributors shall have the first charge over the prints and the distribution, exhibit on and exploitation rights of the picture in the specified territory till the amount due to the distributors is fully discharged. Reliance is placed on the assurance in the instrument that the distributors shall have a first and paramount charge on the net realisations from the picture Mr. R. Janardhana Rao, appearing *amicus curiae* for the respondent emphasises that at the time when the instrument was executed the picture was still under production, the positive prints were yet to be taken after the completion of the picture and there was then no property in existence for any transfer to operate thereon. It is pointed out that before positive prints are got ready and given to the distributor for exhibition, several stages have to be passed through, the negatives have to be completed and the picture would have to pass through the Board of Censors The picture may come through as proposed and planned or there may be variations. Till the picture is completed and ready for exhibition, the property over which mortgage rights could be claimed would be non-existent. It may be that the distributor could enforce the contract and secure the prints if they should come into existence, but that would not make the instrument at its execution a mortgage deed

The Articles of the Stamp Act, 1899, under which the instrument can possibly fall are ; Article 5 (*c*) of Schedule I-agreement or memorandum of agreement relating to deposit of title deeds, pawn or pledge ; and Article 40—mortgage deed. Article 6 may be left out, as the instrument in question is unattested, and unattested instruments relating to pawn or pledge are exempted under Article 6 The State does not rely on that Article. Article 40, which provides for a mortgage deed excludes agreements relating to deposit of title deeds pawn or plege, bottomry bond, mortgage of a crop, respondentia bond or security bond. A mortgage deed under Article 40 is classified under two heads : Article 40 (*a*) is for cases when possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed to be given ; the duty here is the same as for a conveyance ; clause (*b*) covers cases when possession is not given under the mortgage deed The clause relied upon here is clause (*a*). Section 2(17) of the Act defines a mortgage deed thus :—

" Mortgage deed includes every instrument whereby, for the purposes of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers or creates, to, or in favour of, another, a right over or in respect of specified property."

The definition of a mortgage deed under the Stamp Act is wide and extensive and is not limited to immoveable property and the definition is special and introduced for the purpose of the Act; the mortgage can be even for the performance of an engagement and includes a charge and the definition is of the instrument and not of the transaction. The essential elements required for an instrument to be a mortgage deed under the Act are (1) there must be a transfer or a creation of a right over, or in respect of a property by the instrument and (2) it must be a right over or in respect of 'specified' property. The expression 'specified property' has not been defined under the Act nor the expression 'transfer'. The expression 'property' has therefore to be taken in its widest amplitude, comprehending in its scope every possible interest which a party can have, capable of transfer or being subjected to rights. The expression 'transfer of property' whether moveable or immoveable is defined in the Transfer of Property Act, 1882, by section 5 thus:

" In the following sections, 'transfer of property' means an act by which a living person conveys property in present or in future to one or more other living persons, or to himself and one or more other living persons; and 'to transfer property' is to perform such act ".

The word 'conveyane' is used in this definition in a wide sense so as to include sale, mortgage, charge, lease, etc. As will be seen presently it is settled law that while a transfer of property may take place not only in the present, but also in the future, the property must be in existence at the time of the transfer, for an instrument to be a deed of transfer. The words 'in present or in future' in the definition, it is manifest, qualify the word 'convey' immediately preceding 'property' and not the word 'property'. The conveyance may be in present or in future, but the conveyance should be of property in existence. A purported transfer of property, not in existence at the time of the contract, can only operate as a contract to be performed in future. Reference in this connection may be made to the decision of the Privy Council in *Ranee Bhobosoondree Dasseah* v *Issurchunder Dutt*[1]. There, a person who had not the means to institute a suit for the recovery of the property he was entitled to agreed to sell and sold a moiety of the property to another in consideration of a sum of money, which the other person was to pay for the purpose of carrying on the suit, both of them to figure as plaintiffs. Shortly after the conveyance, the owner compromised with the opposite party, who was in possession of the property. Affirming the dismissal of the suit in ejectment filed by the person who had advanced the money as on a sale against the owner and the opposite party, their Lordships observed that the transaction of sale did not operate as a present transfer of the property, but only as an agreement to transfer so much of it as might be recovered in a suit to be instituted. They referred to earlier observations of the Privy Council in *Rajah Sahib Perhlad Sein* v. *Y. Baboo Budhoo Singh*[2], where it is stated:

" To support it, the execution of the bill of sale must be treated as a constructive transfer of possession But how can there be any such transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession and to which he may never establish a title. The bill of sale in such a case can only be evidence of a contract to be performed in future and upon the happening of a contingency of which the purchaser may claim a specific performance, if he comes into Court showing that he has himself done all that he was bound to do "

In *Jugalkishore Saraf* v. *Raw Cotton Company Limited*[3], the Supreme Court pointed out that " under the Transfer of Property Act, there can be no transfer of property

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1. (1909) 11 Beng L.R. 36 18 W.R 140 (P.C.).
2. (1869) 2 Beng L.R. 111: 12 M.I.A. 275, 286, 307.
3. (1955) S.C.J. 371: (1965) 1 S.C.R. 1369: (1955) 1 M.L.J. (S.C.) 220 A.I.R. 1955 S.C. 376.

which is not in existence at the date of the transfer" If there can be no transfer *in praesenti* of property not in existence, it stands to reason and follows that there can be creation of right over, or in respect of such property In our view, the principles that govern the construction of the word 'transfer' in relation to property under the Transfer of Property Act, would equally apply to the transfer or creation of right provided under the definition "mortgage deed" in section 2 (17) of the Stamp Act. The Lahore High Court in *Miran Baksh* v. *Emperor*[1], on a Stamp Reference observed :

> "A transfer of property that is not in existence operates as a contract to be performed in future which may be specifically enforced as soon as the property comes into existence, but it does not operate as a transfer I am of opinion that the same principles must govern the construction of the words 'transfer' and 'property' used in section 2 (17) of the Stamp Act, and in order that a document by which property is transferred may come within the purview of a mortgage deed for the purposes of the Act, the property to which it relates must be in existence."

The learned Government Pleader drew our attention to In re *Gajraj Singh*[2], also a Reference under the Stamp Act, as authority for the proposition that future property could be subject of mortgage Having perused the judgment carefully, we find no warrant for such an inference. What was hypothecated there was produce of a field with sugarcane, then existing property, and there was no discussion in the case whether property not in existence could be the subject of mortgage; nor does the decision in *The Secretary to the Commissioner of Salt, Abkari and Separate Revenue, Revenue Board* v. *Mrs. Orr*[3], cited for the State advance the contention. The question there was whether the instrument was a mortgage within the meaning of section 2 (17) of the Stamp Act and was chargeable with stamp duty under Article 40 or was a declaration of trust chargeable under Article 64. The instrument was between the proprietors of a business and the Bank of Madras, who had agreed to advance moneys. The deed covered besides machinery, plant etc., stock-in-trade, goods, chattels and effects of the business in Madras and Rangoon, described in the schedule to the instrument The net profits realised after payment of expenses under the instrument in question were also to be retained by the trustee under the instrument in trust to pay and apply the same in payment of sums advanced by the bank The Special Bench held that so far as stock-in-trade etc., described in the deed as trust properties were concerned, the properties were specified and that the instrument was a mortgage deed. But as to net profits, which had also to be applied in payment of the sums advanced by the bank it was observed, at page 649 "It may be that the net profits here are not 'specified property' within the meaning of the definition".

Crompton Engineering Co, Madras Ltd v *Chief Controlling Revenue Authority, Madras*[4], again is only an authority for the position that stock-in-trade is 'specified property' within the meaning of section 2 (17). In that case it was held that the document was not a mortgage deed, as there was no transfer of rights in accordance with the requirements of section 59 of the Transfer of Property Act Apart from the stock-in-trade, there were other items of properties and immoveable property comprised in the transaction all one and indivisible, and the instrument was unattested. While holding, in the circumstances, that there was no mortgage, their Lordships pointed out that to make a document liable to stamp duty as a mortgage deed it was not enough if the document purported to effect a transfer but that it must transfer. Authority for the view that stock-in-trade is 'specified property' under section 2 (17) is not authority for the position that future property could be the subject of immediate transfer. Stock-in-trade is not future property If stock-in-trade is mortgaged there is existing property for the transfer to act upon, the security takes in all the effects then available as stock in trade No doubt substituted property

1 A I R. 1945 Lah 69 (S B).
2. I L R (1887) 9 All 585
3. (1913) 25 M L J 613 I L R 38 Mad 646
4 I L R (1953) Mad. 566 (1953) 1 M L J. 620.

may be effectually included in the security by apt words, which can be found and are usually found in mortgages of stock, machinery, plant and the like where the subject-matter may change from day to day. It is a matter of construction of the deed, whether effects subsequently brought in on the premises for the purposes of replacing those disposed of or consumed in the course of the business are covered by the mortgage. They are future property, but when the instrument is executed there is existing property. No formalities are required for the creation of a mortgage of moveable property. A parole mortgage of goods is perfectly valid, though a transfer of an actionable claim will have to comply with the requirement of section 130 of the Transfer of Property Act. For the purpose of the Stamp Act, the effect of the instrument has to be examined at the time of the execution, whether in fact there is an operative transfer or mortgage on the execution of the instrument and by virtue of the instrument In this connection we may refer to the observations of the Supreme Court in *Jugalkishore Saraf* v. *Raw Cotton Co., Ltd* [1], already cited, where it is observed as follows :—

"Where there is a contract for the transfer of property which is not in existence at the date of the contract, the intending transferee may, when the property comes into existence, enforce the contract by specific performance, provided the contract is of the kind which is specifically enforceable in equity It is only when the transferor voluntarily executed a deed of transfer as in all conscience he should do or is compelled to do so by a decree for specific performance, that the legal title of the transferor in that property passes from him to the transferee. This transfer of title is brought about not by the prior agreement for transfer but by the subsequent deed of transfer. This process obviously involves delay, trouble and expenses. To obviate these difficulties equity steps in again to short circuit the process ".

Their Lordships earlier refer to the equitable principles enunciated by Lord Westbury in *Holroyd* v. *Marshall* [2], in the following words :—

"It is quite true that a deed which professes to convey property which is not in existence at the time is as a conveyance void at law, simply because there is nothing to convey. So in equity a contract which engages to transfer property, which is not in existence, cannot operate as an immediate alienation merely because there is nothing to transfer. But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards became possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired ".

The equitable principle flowing from the above that equity treats as done what ought to be done does not make out any new contract between the parties or alter the true character of the original instrument

The decision in *Performing Right Society Ltd* v. *London Theatres of Varieties Ltd.* [3], referred to with approval by the Supreme Court in *Jugalkishore Saraf* v. *Raw Cotton, Company Limited* [1], may be usefully referred to here. There a firm of music publisher being members of the plaintiff-society assigned by deed to the society the performing right of every song the right of performance of which they then possessed or should thereafter acquire, to be held by the society for the period of the assignor's membership. Subsequent to the said assignment, an author wrote a song and assign-

1 (1955) S C J 371 (1965) 1 S C R 1369 · (1955) 1 M L J (S C) 220 · A I R 1955 S C 376.

2 (1862) L R 10 H L C 191, 210-211

3 L R (1924) A C 1

ed the copyright in it together with the right of performance to the firm of publishers The firm did not make any fresh assignment in respect of this song to the society as required under the English Copyright Act, 1911 In an action by the society against the defendants for infringement of their performing rights in the song under the original assignment rejecting the claim of the plaintiffs as assignees of the copyright, under the Copyright Act, Viscount Cave, L C, said (at page 13) :

"No doubt when a person executes a document purporting to assign property to be afterwards acquired by him, that property on its acquisition passes in equity to the assignee, *Holroyd* v *Marshall*[1], *Tailby* v *Official Receiver*[2], but how such a subsequent acquisition can be held to relate back, so as to cause an instrument which on its date was not an assignment under the Act to become such an assignment, I am unable to understand."

If we examine the instrument under consideration here, in the light of the above principles, it is manifest that it is not a mortgage deed as defined under section 2 (17) to be charged under Article 40 of Schedule I as there could have been no transfer or creation of right in or over property at the time of the execution of the instrument When the instrument was executed, the film was under production There was merely a covenant on completion of the picture to deliver certain positive prints of the picture to the distributor Certain rights were assured over property to come into existence

The second ingredient for an instrument to be a mortgage deed under section 2 (17) is that the property should be 'specified property.' The dictionary meaning of the word "specify" is, to mention, describe, or define in detail. Property may be considered to be 'specified' if it is clearly defined so that there may be no difficulty in its identification. Non-existent property cannot be considered to be clearly defined and capable of identification at the time when the instrument is executed May be sufficient description is found in the instrument to enable identification *in futuro* ; but what the definition requires is transfer or creation of rights over or in respect of specified property, that is, at the time the instrument is executed A property cannot be regarded as certain and defined *in praesenti* when all that is found is, hope and expectation and sustained effort to produce property as specified and the thing is in the course of production in accordance with specifications There can be no question that anticipated realisations on exhibition are not specified properties. In the decision in *Secretary to the Commissioner of Salt Abkari and Separate Revenue, Revenue Board, Madras* v *Mrs. Orr*[3], cited already, it is remarked that anticipated net profits over which a charge is provided may not be specified property The several rights which are to be security for the advances made by the distributors have yet to come into existence In the circumstances, even assuming that there was every possibility, and even probability bordering on certainty of the producer completing the picture as planned, and that in fact the distributor later secured his prints, the subsequent acquisition of the security cannot relate back so as to make the instrument a mortgage deed when it was executed Any equitable rights which the distributor may acquire later under the instrument can have no relevancy in considering the character of the instrument for fiscal purposes, at the time of its execution There is no need here to consider any other Article. For a pawn or pledge also there must be delivery of property either actual or constructive; a mere agreement to give possession cannot operate as a pledge and for the instrument to be a conveyance there must be transfer and here, there can be no transfer or delivery of possession.

We, therefore, hold that the instrument in question is not a mortgage deed as defined in section 2 (17) chargeable under Article 40 (*a*) or (*b*) of Schedule I of the

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1 (1862) 10 H L C 191
2 (1838) L R 13 A C 523
3 (1913) 25 M L J 613 I L R (1915) 38 Mad 646

Indian Stamp Act. It is only an agreement. The question is answered accordingly. No order as to costs. We thank Mr R. Janardhana Rao, Counsel appearing as *amicus curiae* for his assistance.

V.K. ——— *Reference answered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE A ALAGIRISWAMI

C. V. Venkataramana Iyengar Dharmasthapanam, Coimbatore by Managing Trustee, Dr. C A. Vijayaraghavan . *Appellants**

v.

P. N. Rangaswami Naidu .. *Respondents*

Law of limitation—Plaintiff's earlier suit for the same relief—Decree and later dismissal on appeal—New period of limitation—If commences from the date of setting aside of the decree in earlier suit

The only question for determination was whether the fact that the plaintiff had earlier filed a suit for the very same relief and got a decree which was later set aside, would help him to claim that new period of limitation should be calculated from the date on which the earlier decree was set aside.

Held that, the plaintiff in this case could not have filed a suit between 31st August, 1956, the date on which he obtained a decree in his favour in the earlier suit and 18th March, 1958, the date on which that decree was set side. Thus, during a period of at least one year and seven months, the plaintiff could not have filed a suit.

But applying the principle laid down in *Nrityamoni Dassi* v. *Lakhan Chunder Sen*[1] (1916) 30 M.L.J. 529: I.L.R. 43 Cal. 660 (P.C) the period between 26th November 1953 the date on which the previous suit was filed and 18th March, 1958, the date on which the decree in that suit was set aside could be excluded in calculating the period of limitation. Whether it is to be on the ground of exclusion of the period of time taken in the earlier suit for the same relief, or on the ground that while the plaintiff had a decree in his favour for the very same relief, the cause of action is suspended and is revived again when the previous decree is set aside and the plaintiff in this case would be entitled to have the period occupied in the previous litigation excluded.

The plaintiff in this case refrained from filing a suit in time, because in the earlier suit he had asked for the very same relief for which he has now sued and that suit was dismissed on the ground that it was premature. Therefore, on the dismissal of the earlier suit, his cause of action which had merged in the decree in that suit, revived and a fresh cause of action arose on the day on which the previous suit was dismissed on 18th March, 1958

Appeal against the decree of the District Court, Coimbatore in A.S No. 195 of 1961 preferred against the decree of the Sub Court, Coimbatore in O S. No 57 of 1959.

R. Ramamurthy Ayyar and *V Ratnam*, for Appellants.

K. V. Sankaran and *K Ranganathan*, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff in O.S. No 57 of 1959 on the file of the Subordinate Judge's Court, Coimbatore, is the appellant. The plaintiff filed the suit, out of which the present appeal arises, for the recovery of a sum of Rs.6,893-75, made up of Rs 6,750 being arrears of rent for three years from 15th April, 1953 to 15th April, 1956 and Rs. 143-75 being the damages for use and occupation from 15th April, 1956 to 8th August, 1956.

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*S.A No 577 of 1963. 7th April, 1967.

The facts necessary for decision in this case are the following. The defendant took on lease the lands belonging to the plaintiff on 15th April, 1953, on a rent of Rs. 2,250 per annum. The plaintiff filed a suit O S. No 48 of 1954, on 26th November, 1953, on the file of the Subordinate Judge's Court, Coimbatore alleging that the defendant has failed to pay on 11th October, 1953, the half-yearly rental of Rs. 1,125 and thereby forfeited the lease and claiming possession and mesne profits upto the date of possession. The suit was transferred to the Court of the District Munsif, Coimbatore and renumbered as O.S No. 714 of 1956 The suit was decreed on 31st August, 1956 The defendant took the matter on appeal to the District Judge, Coimbatore, who held that the suit was premature and dismissed it. It must be mentioned that by the t me the suit was decreed, the plaintiff had taken possession of the properties on 8th May, 1956 In the result, the plaintiff got a decree in the trial Court for the sum which is claimed in the present suit But, as mentioned earlier, the appeal was allowed and the suit was dismissed on 18th March, 1958. Thereafter the plaintiff filed the suit out of which the present appeal arises The defendant raised many contentions, all of which are not necessary for the purposes of this appeal to be referred to The main contention of the defendant was that the suit was barred by limitation The trial Court decreed the suit, but on appeal the learned District Judge of Coimbatore, held that the cla m for arrears for the period 1952-54 and 1954-55 was barred by limitation It is against this judgment that the present appeal has been filed

The only question that arises for decision in this case, is, therefore, the question of limitation. Before the Courts below the plaintiff seems to have relied upon section 14 of the L mitation Act for the purpose of saving limitation The learned Subordinate Judge who tried the suit held that section 14 of the Limitation Act would not apply to the facts of the case but, relying on the decisions in *Mst. Raneesorna Moyee* v. *Shooshee Mokhee Burmonia*[1], and *Muthuveerappa Chetti* v *Adaikappa Chetti*[2], he held that the suit was in time In this Court, the appellant does not rely upon section 14 of the L mitation Act, but relies upon the two decisions mentioned above as well as the decisions in *Lakhan Chunder Sen* v. *Madhusudhan Chandra Sen*[3], and *Nrityomani Dassi* v *Lakhan Chunder Sen*[4]. I do not think that the appellant can be prevented from trying to support his plea that the suit is not barred by limitat on on a new ground because it is well-established that as long as all the facts necessary for a decision of the question are before the Court, it is open to the Court to consider the question that arises on those facts.

The facts mentioned above would clearly show that the plaintiff had in the earlier suit claimed the very amounts which have been claimed in the present suit in respect of the very same land against the very same defendant and he had also got the relief he asked for. The only reason for the dismissal of the earlier suit was that it was premature. It is contended on behalf of the respondent that there was nothing to prevent the plaintiff from filing a suit for arrears of rent even while the previous suit was pending The present suit was filed on 3rd April, 1959, soon after the dismissal of the earlier suit by the appeal being allowed on 18th March, 1958. To expect the plaintiff to file a suit for the very same sum due to him on the very same cause of action when he had got a decree for that sum is to take a very technical and unrealistic view. The plaintiff had got the relief which he wanted and there is no point in saying that he should file another suit for the same relief when he had a decree in his favour for the same relief

The defendant respondent pointed to section 9 of the L mitation Act and contended that the period of limitation never stops running once it has begun to run and, as the rent for the year 1953-54 was payable on 15th April, 1954 and the rent due for 1954-55 was payable on 15th April, 1955, the claim in respect of both the

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1 (1867-69) 12 M I A 244
2. (1920) 39 M L J 312 . I L R (1920) 43 Mad. 845.
3 I L R (1906) 35 Cal 209
4 I.L R 43 Cal 660 (P C.) . (1916) 30 M L J 529

amounts was clearly barred on 3rd April, 1959 when the present suit was filed. The plaintiff, having filed the earlier suit on 26th November, 1953, and got a decree for the very sum now claimed on 31st August, 1956 which decree was set aside on 18th March, 1958, could not have filed any suit between the period 26th November, 1953 and 18th March, 1958. In any case, he could not have filed a suit between 31st August, 1956 the date on which he obtained a decree in his favour in O S No. 714 of 1956, and 18th March, 1958, the date on which that decree was set aside. Thus, during a period of at least one year and seven months the plaintiff could not have filed a suit. It is not necessary for the plaintiff to depend upon Ordinance V of 1953, which came into force on 5th December, 1953, Act V of 1954, which came into effect on 5th February, 1954 and Act I of 1955 the combined effect of all the three of which was that no suit could be filed against an agriculturist from 5th December, 1953 to 1st July, 1955 The combined effect of these three enactments was that a period of one year, six months and twenty days will have to be excluded in computing the period of limitation. But where, as in this case, the rent due for 1953-54 was payable only on 15th April, 1955, it is not the whole period of one year, six months and twenty six days that can be excluded, but only one year, two months and fifteen days in respect of the rent for the year 1953-54 and a period of two months and fifteen days in respect of the rent for the year 1954-55 that could be excluded. Even if these periods are excluded in computing the period of limitation, the suit will be out of time. Therefore, the only question is whether the fact, that the plaintiff had earlier filed a suit for the very same relief and got a decree which was later set aside, would help him to claim that new period of limitation should be calculated from the date on which the earlier decree was set aside I think he can.

I have already mentioned that to expect the plaintiff who had got the relief that he wanted in the earlier suit, to file a suit for the very same relief when there was a decree in his favour, would be unrealistic and unreasonable.

In *Nrityamoni Dassi* v. *Lakhan Chunder Sen*[1], the facts were as follows. In 1872 one Guru Charan Sen died intestate leaving a widow and three sons, B M M M. and C L C L died in 1881 On 18th January, 1892 M M and the sons of C L. were dispossessed of their share in certain property. In 1896 the sons of C.L. instituted a suit against B M and M M for possession and account and in 1897, on the death of B M. and M M. their sons were brought on record The sons of M M. supported the sons of C L and an issue was raised as between the co-defendants as to whether the sons of M M. were entitled to a certain share. A decree dated 20th April, 1903, was passed in favour of the plaintiff and it was further declared that the defendants, the sons of M M were entitled to the share they claimed The sons of B M appealed On 22nd February, 1904, the appeal Court confirmed the decree in favour of the plaintiffs and set aside the decree so far as it related to the sons of M M Thereupon on 14th November, 1904 the sons of M M instituted suit against the sons of C L and B M for possession, partition and accounts Their Lordships of the Privy Council after discussing the facts, observed in *Nrityamoni Dassi* v. *Lakhan Chunder Sen*[1] (at page 664) as follows —

> "It was an effective decree made by a competent Court and was capable of being enforced until set aside Admittedly, if the period during which the plaintiffs were litigating for their rights is deducted, their present suit is in time Their Lordships are of opinion that the plea of limitation was rightly overruled by the High Court".

This would show that, applying the same principle, the period between 26th November, 1953, the date on which the previous suit was filed, and 18th March, 1958, the date on which the decree in that suit was set aside, could be excluded in calculating the period of limitation Whether it is to be on the ground of exclusion of the period of time taken in the earlier suit for the same relief, or on the ground that while the plaintiff had a decree in his favour for the very same relief, the cause

1 30 M L J 529 I L R (1916) 43 Cal 660 (P C)

of action is suspended and is revived again when the previous decree is set aside and the plaintiff in this case would be entitled to have the period occupied in the previous litigation excluded.

Muthuveerappa Chetti v. *Adaikappa Chetti*[1], was a case of dispute between a principal and his agent The principal launched a criminal prosecution against the agent and in arbitration between the parties it was decided that the agent should pay the principal Rs. 10,000 in full satisfaction of the principal's claims. The agent paid Rs. 7,000 and gave a hundi for the balance of Rs. 3,000. Thereafter the agent refused to pay the amount due on the hundi and also filed a suit for recovery of the sum of Rs. 7,000 which he had already paid, on the ground that it had been obtained by coercion He succeeded in both Subsequently, the principal instituted a suit for rendition of accounts. The defendant's contention that the suit was barred by limitation was overruled. The High Court, following the decision of the Privy Council in *Mst. Ranee Surno Moyee* v *Shooshee Mokhee Bhumonia*[2], held that the suit was in time on the ground that the annulment of satisfaction in the prior suit gave to the creditor a fresh cause of action upon the original claim and that the time began to run from the date of annulment.

The learned Subordinate Judge, who tried the suit, has also referred to the facts in *Mst. Ranee Surno Moyee* v *Shooshee Mokhee Bhumonia*[2], as well as the facts in *Muthuveerappa Chetti* v *Adaikappa Chetti*[1] Those cases as well as the case in *Nrityamoni Dassi* v. *Lakhan Chunder Sen*[3], already referred to, are ample authority for the proposition that in a case like this the plaintiff can successfully claim that the time spent in the earlier litigation should be excluded in calculating the period of limitation for the present suit. The learned trial Judge was also right in coming to the conclusion that the decision in *Huro Pershad Roy* v. *Gopal Das Dutt*[4], and *W. Sheriff* v. *Dianath Mukherjee*[5], did not apply to the facts of the present case. In both those caes the earlier suit was for possession and the subsequent suit was for rent Naturally, the time taken in prosecuting the suit for possession cannot be excluded in computing the period of limitation for a suit for rent in respect of the same lands In the present case, however, the suit was on the basis of mesne profits and in the present suit on the basis of rent due.

In this Court the respondent also relied upon the decision of the Full Bench of this Court in *Sundaramma* v *Abdul Khader*[6] In that case a mortgagee-decreeholder filed an execution application for sale of the mortgaged properties on 2nd October, 1922. It was dismissed on 16th January, 1923 Meanwhile, third persons filed a suit against both the mortgagor and the mortgagee alleging that the mortgaged properties belonged to a public religious endowment and were as such inalienable and sought for a declaration from the Court to such an effect That suit was decreed a day previous to the dismissal of the execution application But on appeal the High Court reversed the decision of the lower Court and dismissed the collateral suit on 16th August, 1927 The mortgagee-decreeholder put in another execution application after the termination of the said appeal on 23rd September, 1927, but it was dismissed as time-barred. On the question whether the decree in the collateral litigation would be tantamount to an injunction staying the execution proceedings and whether the fresh application filed after three years would be taken to revive or continue the original application for execution filed by the decreeholder it was held that in order to make the provisions of section 15 of the Limitation Act apply to the case, it must be shown that a suit or application for execution of the decree had been stayed by an injunction or order and that if the decreeholder could not bring herself within the exemptions provided for in the Act, she could not escape the bar

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1 (1920) 39 M L J 312 I L R. (1920) 43 Mad 845.
2 (1867-69) 12 M I A 244
3 (1916) 30 M L J 529 I L R (1916) 43 Cal 660 (P.C)
4 I L R (1883) 9 Cal 255
5 I L R (1886) 12 Cal 258
6 (1933) 64 M L J 664 I L R. (1933) 56 Mad 490 A I R 1933 Mad 418.

of limitation by pleading in equity an implied order or a collateral litigation which would render her proceedings futile Now, the decision in that case cannot help the respondent, because that was concerned with a collateral litigation and the provision of law taken into consideration was section 15 of the Limitation Act We are not now concerned with section 15 nor are we concerned with a collateral litigation because of which the plaintiff refrained from filing a suit in time The plaintiff in this case refrained from filing a suit because in the earlier suit he had asked for the very same relief for which he has now sued and that suit was dismissed on the ground that it was premature. Therefore, on the dismissal of the earlier suit, his cause of action which had merged in the decree in that suit, revived and a fresh cause of action arose on the day on which the previous suit was dismissed on 18th March, 1958 I am of opinion, therefore, that the trial Judge was right in decreeing the suit and that the reversal of that decree by the learned District Judge was not justified. The appeal is, therefore, allowed and the decree of the trial Judge will be restored The respondent will pay the costs of the appellant throughout. Leave granted.

V.M.K. —— *Appeal allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR JUSTICE T. RAMAPRASADA RAO

K. Muniandi .. *Petitioner**

v.

Selvarajan and another .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 8-*A*—'*Indemnity*'—*Meaning of*—*Impleading the father of the plaintiff as the second defendant for not having given credit to the amounts paid*—*If permissible under.*

Order 8-A of the Civil Procedure Code (V of 1908) prescribes a special method by which a party-defendant could secure relief without independently filing a suit against a third party to the suit, if he makes out a case that such third party is bound to indemnify him in connection with the suit transaction. Indemnify referred to in Order 8-A need not necessarily spring from contract. That being so, the petitioner having paid certain amounts to the father of the plaintiff in liquidation of the promissory note debts and the father not having accounted for the same either by instructing his son to give credit to it or otherwise, he is entitled to implead the father as second defendant in the action.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Munsif, Vellore in I A No 382 of 1966 in O.S. No. 110 of 1964

K. N. Balasubramaniam and *M. Srinivasan*, for Petitioner

R. Shanmugham and *K. Ramachandran*, for Respondents.

The Court made the following

JUDGMENT.—The defendant in the suit applied under Order 8-A Civil Procedure Code, for impleading the father of the plaintiff as the second defendant to the suit. The suit itself was one on a promissory note. The defence was that it was taken *in terrorem*, not supported by consideration, and that a portion of the amount due and payable under the said promissory note was already recovered by the proposed party, *viz.*, the father, and that such amounts have to be given credit to by the plaintiff, the son. It is seen from the records that the written statement was signed by the Advocate for the defendant on 27th November, 1965, but the third party application was taken out on 10th March, 1966. The learned District Munsif, in his order, states that there is no specific allegation in the written statement that amounts were paid by the first defendant to the proposed party and

*C.R.P. No 1724 of 1966 21st April, 1967.

that they were paid towards the suit pronote. But on a fair reading of the allegations in paragraph 14 of the written statement this factual statement of the lower Court in its order is not fully supported. One other point which was uppermost in the mind of the lower Court, in disallowing this application under Order 8-A was that the first defendant may have an independent cause of action against the proposed party resting his case on the allegations made in the written statement, but he ought not to impose another party defendant to the suit against the will of the plaintiff.

It is no doubt true that in civil litigations the plaintiff is the *dominus litis* But Order 8-A appears to be an exception to this broad principle of procedure Order 8-A, in fact prescribes a special method by which a party defendant could secure relief without independently filing a suit against a third party to the suit, if he makes out a case that such third party is bound to indemnify him in connection with the suit transaction. Further, in my opinion, if the party, who is legitimately entitled to press into service Order 8-A, were to be driven to an independent suit, there is likelihood of a conflict of decisions as well, not to speak of multiplicity of proceedings. It is essentially to avoid such conflict and multiplicity that Order 8-A has been provided, particularly in a very detailed way in our State.

Learned Counsel for the petitioner states that this is a fit case in which Order 8-A may be attracted to the advantage of his client. His case, *inter alia*, is that he has paid certain amounts either in cash or in the shape of jewels to the father of the plaintiff, in liquidation of the promissory note debts, and the father not having accounted for the same either by instructing his son to give credit to it or otherwise, he is entitled, in the suit instituted by the son without reference to such payments, to implead the father and obtain contribution or indemnity from him in equity. That such a party placed in similar circumstances is entitled to implead the third party to a suit under Order 8-A and claim indemnity from him is clear from the ratio of the decision in *Rudrappa Chetti* v *Narasimha Chetti*[1]. Anantanarayanan Officiating C.J. (as he then was) observed as follows at pages 161 and 162:

> "......... Any later suit that might have to be filed by the defendant against the original mortgagee, in case the present suit by the plaintiff (assignee) succeeds, might well be brought within the scope of an action for 'indemnity' The expression indemnity has to be interpreted broadly and would mean claims to indemnity as such either at law or in equity."

While respectfully adopting the observations of the learned Judge, it is apposite also to refer to the meaning of the expression 'indemnity' as found in *Eastern Shipping Company* v. *Quash Beng Kee*[2]. Their Lordships observed in the above cited case:

> "A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other. There are, for instance, cases in which the state of circumstances is such that the law attaches a legal or equitable duty to indemnify arising from an assumed promise by a person to do that which, under the circumstances he ought to do."

The principle has also been very succinctly put in the Annual Practice, 1965, Volume I, page 322 in the following terms:

> "In effect a claim to contribution is a claim to a partial indemnity. Contribution is bottomed and fixed on general principles of justice and does not spring from contract, though contract may qualify it."

On an examination of the general principles laid down and set out as above, it is clear that 'indemnity' referred to in Order 8-A need not necessarily spring from contract. It can be spelt from the circumstances; but each case has to be decided

1. (1965) 2 M L J 160 . 78 M L W 524 A.I.R. 1965 Mad 495.
2 L R (1924) A C 177 at 182.

on its merits. As pointed out by Panchapakesa Aiyar, J in *Uthaman Chettiar* v *Thiagaraja Pillai*[1], in suits concerning negotiable instruments, an objective test has to be applied and it has to be found out whether the party intends to take advantage of Order 8-A only to waste the time of the Court by unnecessary third party notices. But he has categorically held in the earlier portion of his judgment that in suitable cases third party notices can be issued even in suits on promissory notes. I am of the opinion that the instant case is one such suitable case. The mere fact that the first defendant can institute an independent action, by itself cannot be a basis to dismiss the application by him to implead a third party, who is none else than the father of the plaintiff in the suit, as second defendant in the action. This is the only criterion on which the lower Court rested its conclusion. The order of the lower Court is, therefore, set aside, on the ground that it has not properly exercised its jurisdiction while considering the scope of Order 8-A

The civil revision petition is therefore, allowed with costs

V.M K. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR M ANANTANARAYANAN, *Chief Justice* AND MR. JUSTICE M. NATESAN.

Kimberly Clark Corporation .. *Appellant**

v.

Bay's Chemicals . *Respondent*

Indian Trade Marks Act (V of 1940), *section* 9 (1) (c)—" *Invented word* "—*Meaning of*—" *Blotex* ", *if an invented word*—*Coined word falling under section* 9 (1) (*c*) *of the Act.*

Trade mark registration—*Objections to*—" *Blotex* ", *if will lead to deception of unwary customers accustomed to buying goods under* " *Kotex* " *trade mark.*

The two questions for determination are (1) whether the word ' Blotex ' within section 9 (1) (*c*) of the Indian Trade Marks Act, 1949; and (2) whether in view of the long-established prior user and registration of ' Kotex ', the registration of ' Blotex ' ought not to be allowed, because of the possibility of deception and confusion in the minds of customers

Held that, a compound word which is, *ex facie* a bare or undisguised combination of other complete words, could not be regarded as an invented word. The principle is that there must be invention and not the mere semblance or appearance of an invention The word Blotex cannot be regarded as a compound of two distinct words Blot and Ex, the latter word is meaningless in ordinary English usage and the Latin expression, Ex, namely, " out of " is never used as a suffix to an English word, and if so employed, is altogether meaningless. The word Blotex is a coined word, having no intended relationship either to the word ' blot ' or to the use of this product in personal living The Latin expression " ex " has also no relationship, logically or in any other manner to the trade mark. Thus, the word falls within section 9 (1) (*c*) of the Act.

Held also that, the section of the public which may be taken as likely to patronise this particular category of goods (sanitary napkins and belts), is a sophisticated section of feminine society, with a flair to considerable literacy qualification. It is most unlikely that if Blotex napkins are supplied for Kotex, such ladies will accept them, thinking that the goods are identical. Certainly, the goods may be accepted as the best substitute, or as a distinct trade product serving the same purpose. But that is not the test It is whether the casual or relatively unwary customer of the particular class of goods, is likely to be deceived or confused by the deceptive phonetic or orthographic similarity, into accepting goods of one

1. (1955) M W N. 799 . (1955) 68 M L W. 810 · A I R. 1956 Mad 155.

* L.P.A No 68 of 1964. 26th July, 1967.

brand for the other, under erroneous impression that they are identical. Such a possibility can be totally ruled out in this case Considering the class of persons who would be the customers in respect of these goods, and what can be reasonably expected of them.

Appeal under clause 15 Letters Patent against the order of Venkatadri, J., in A.A.O. No. 317 of 1961, dated 9th January, 1964

King & Patridge, for Appellant.

M P. Rao, for Respondent

The Judgment of the Court was delivered by

Anantanarayanan, C J—Messrs. Kimberly Clark Corporation were the owners of the trade mark Kotex, a mark relating to sanitary napkins and belts, which were being sold by the firm in international markets. It appears that this mark had a previous history. The original registration relating to a Wisconsin Corporation, which effected this registration at Calcutta in 1944 In 1940, this country legislated a new measure with regard to the registration of trade marks (Indian Trade Marks Act, 1940) and the International Cellucotton Products Co, obtained rights with regard to this particular mark Kimberley Clark Corporation (appellants) are the successors in respect of this right.

The respondents before us (Bay's Chamicals) applied for registration of the trade mark Blotex, relating to the same category of goods, namely, sanitary napkins and belts, and the appellant firm instituted a notice of opposition during the attempted registration of this mark. The objections were overruled by the Assistant Registar of Trade Marks, who accepted the word Blotex and placed in the Register, as the trade mark relating to the goods traded in by the respondent firm The dispute came up before Venkatadri, J., in C M.A No 317 of 1961, and after a reference to several of the leading decisions, the learned Judge held that the respondents were entitled to maintain the entry in the register, and that the appellants had no cause of action The appeal was dismissed, and the present Letters Patent Appeal is instituted from the judgment of the learned Judge.

The grounds are restricted in scope, and there are only two arguments that appear to require notice at our hands The first is that under section 9 (1) (c) of the Act (XLIII of 1958), the word Blotex is not an invented word, according to the appellant's contention One line of reasoning here is that this word is really a combination of two distinct words, namely Blot and Ex. The authorities are clear, that a word which is a bare or undisguised compound of two other words, cannot by any means be termed as "invented word" within the meaning of the Trade Marks Act The other argument is that, even apart from this aspect of the case, the word Blotex has some reference to the character or quality of the marketed goods, and that, on that ground also, it cannot be termed an invented word On the contrary, it is a word falling within the prohibition of a reference to the character or quality of the goods, to which the mark purports to be assigned.

This is the first aspect of the argument The second aspect is that, independently of this contention, the word is calculated by its close phonetic similarity to Kotex, the registered trade mark of the appellant firm, to deceive the unwary customer, and to cause confusion Hence, it is strenuously contended, on the principles laid down by their Lordships of the Supreme Court in *Amrithdhara Pharmacy* v. *Satya Deo Lakshman Dhara*[1], that we should conclude that the word Blotex is likely to deceive and confuse persons of the class who have been habitually purchasing the Kotex preparations, and for that reason that the mark should be effaced from the Register

We might immediately state that, upon the question whether the word Blotex is an invented word or not, the learned Judge after referring to certain leading decisions in which the principles are expounded, came to the conclusion that the

1 (1963) 2 S C R 484 . A I R 1963 S C 449.

word Blotex is not an invented word, and hence that section 9 (1) (*c*) had no application to the case. Since, after a very careful consideration we are unable to agree with the learned Judge, and, on the contrary, we have no doubt whatever that the word Blotex is an invented or coined word, within the ambit of the principles, we might immediately deal with this matter before proceeding into the related aspect of a deceptive similarity between two marks either as regards the sound, or the orthography.

The learned Judge has referred to the dictum of Lord Macnaghten in *The Eastman Photographic Materials Company, Ltd.* v. *The Comptroller-General of Patents, Designs, and Trade Marks*[1], and stressed that, on the test of what is an invented words, there may be no objection even if the word does contain a covert and skilful allusion to the character or quality of the goods. Lord Macnaghten added.

"I do not think that it is necessary that it should be wholly meaningless"

Lord Halsbury said that a compound word which is, *ex facie* a bare or undisguised combination of other complete words, could not be regarded as an invented word. But he further said that 'the line must be sometimes difficult to draw.' The learned Judge also quoted the dictum of Lord Herschell to the effect that combination of two English words would not, ordinarily, be an invented word. The principle is that there mut be invention, and not the mere semblance or appearance of an invention.

We have set forth these criteria, as in our view, there is no room for doubt or confussion on this aspect. But we think that there is an evident fallacy, in applying these principles to the word Blotex, in the manner in which the Registrar has applied them which apparently was approbated by the learned Judge (Venkatadri, J.). We are quite unable to regard the word Blotex as a compound of two distinct words Blot and Ex; the latter word is meaningless in ordinary English usage, and it is really a Latin expression signifying 'out of.' The reason why we think that the trade mark Blotex cannot be possibly regarded as a compound of these two words, is a clear and simple one. The Latin expression, Ex, namely, "out of" is never used as a suffix to an English word, and if so employed, is altogether meaningless. On the contrary, the Latin expression Ex is generally employed to precede another expression, when alone it makes sense, for instance, *ex post facto*.

Actually, we think that there is a far simpler explanation for the coinage of such words as Kotex or Blotex. Apparently, there is a current trade fashion, in coining words descriptive of various kinds of goods, so as to end with Tex or Ex. This is purely a fashion springing from a presumed phonetic elegance. In this respect, other instances may be given such as Caltex, Cutex and Optrex For that matter, the appellants cannot dispute that the word Kotex is a coined word, and the form of the word clearly relates to a particular kind of popular trade fashion Further, the argument advanced before us for the appellants, relating to orthography, really cuts at the root of the contention that the word Blotex is born out of Blot and Ex. On the contrary, the argument is that this word is deceptively similar to the word Kotex, because the letters otex are common to both

We think that it would be very dangerous to regard trade marks as possibly compounded of syllables, forming words in different languages like English and Latin and to regard them as not being 'invented words' for that reason. It is obvious, for instance, that the syllables or words which are trade marks in English, even if purely invented, might correspond to other words, in a regional language like Tamil. It would be clearly fallacious to argue that these are not invented words, for that particular reason.

Another argument, which has been somewhat elaborated in the affidavit filed on behalf of the appellants is, that the name Blotex includes the word Blot, which itself has some reference, even if not direct but oblique, to the character or

1. L.R. (1898) A.C. 571, 583.

quality of the goods, to which the mark is supposed to relate This argument appears to us to be very far-fetched, and quite unconvincing We think that it is most unlikely that the coiners of this word had this particular significance in mind, when the word was used. Nor do we think that it is at all likely, that purchasers of these goods will associate the part-word Blot, out of the word Blotex, as relating to a possible use of sanitary napkins in personal hygiene. On the contrary, it appears to be fairly evident, if achieving popularity for the goods was the intention behind the word, that the coiners must have regarded it as quite unfortunate to make a compound word from the word " blot ", as having some veiled reference to the use of sanitary napkins in removing stains. We have no doubt whatever that the word Blotex is a coined word, having no intended relationship either to the word ' blot ' or to the use of this product in personal living, but merely following the trade fashion of the coinage of words descriptive of goods as ending in ' tex ' or ' ex '. We are also clear that the Latin expression " ex ", meaning ' cut of,' has no relationship, logically or in any other manner, to the trade mark.

It would thus follow that the word really falls within section 9 (1) (*c*) of the Act. The learned Judge (Venkatadri, J.) has given other instances of Trade Marks from the case-law, but, in our view, there is no area of law where precedents are less directly relevant, apart from the applied principles that they might expound, than in the region of the law relating to trade marks. The only safe rule is to proceed to the precedents for the exposition of the leading principles, and to strictly adjudicate, in each case, on the aggregate of its particular facts. We do not think that it is necessary to state anything more on this aspect.

But though the word Blotex may be an invented word, it is still possible for the appellants to contend that, in view of the long-established prior user and registration of their mark Kotex, the registration of Blotex ought not to be allowed, because of the possibility of deception and confusion in the minds of customers Here, we might immediately state that this argument has to be met on its merits, and quite irrespective of the fact that the product Kotex has not been available in the Indian market for the last few years. Whether Kotex is available or not, and whether, owing to import restrictions, it may be difficult to import this product for some considerable time to come, or otherwise, the appellants are entitled to argue that the issue should be squarely met and resolved, irrespective of such considerations which are purely strategic. We shall, therefore, address ourselves to the main issue here.

The relevant tests have been laid down, in many precedents of the English and Indian Courts, and we do not think that it is necessary to further digress upon the case-law. The principle is not that a discriminating and careful buyer may not be misled by the deceptive phonetic or orthographic similarity, if it exists The test is that of a casual buyer, not necessarily ignorant or unintelligent, but of the ordinary class of buyers, who may not have the time or the energy to further investigate, when he is offered goods of one brand, when making a demand for goods of the other brand. We accept this test, and certainly it is no argument to plead that a customer using the Kotex product who is careful and who is likely to make further investigation before a purchase, is very probably unlikely to accept Blotex products for Kotex products It is further argued that, in this case, both words are, at any rate, invented words of English letters, with English orthography. Since, the letters " otex " are common to both, though the sounds may be different, and since, in *Amrithdhara Pharmacy* v. *Satya Deo Lakshman Dhara*[1], such apparently divergent phrases as Lakshman Dhara and Amrithadhara have been held to be deceptively similar it is pressed that we should accept the appeal, and cancel the registration.

For a very important reason, we are unable to agree We think, that the learned Judge (Venkatadri, J) was right in deciding the main issues in favour of the respondent-firm. As we stressed earlier, an issue of this character cannot be viewed in

1. (1963) 2 S C R. 484 A.I R 1963 S.C. 449.

the abstract, or merely with regard to what happened in other cases, where other similar names or trade marks were before the Court. The issue has to be decided applying the leading principles to the specific facts of the instant case, viewed in their totality. One remarkable feature of the present case is that the section of the public, which may be taken as likely to patronise this particular category of goods, is a limited section, with very distinctive characteristics. It is, beyond doubt, a sophisticated section of feminine society, with a flair to considerable literacy qualification. This is no speculation on our part. It is based on the actual record, and on the several affidavits that have been produced signed by ladies who are customers of Kotex products, on behalf of the appellant-firm. There is no doubt whatever that this particular category of goods has not pervaded levels of the public, below the particular social stratum evidenced by the affidavits. We can certainly take judicial notice of such an obvious fact. It is true that these ladies, who belong to a sophisticated and educated section of the public and who would appear to be of the higher middle class, if not actually affluent, have sworn that, sometimes, they sent their maid-servants for purchasing products of this description. But even so, we think that it is most unlikely that the customers of this kind of goods, who must be necessarily ladies accustomed to relatively high standards of living, will coach up their maid-servants to utter the phonetic word Kotex in the right manner, when demanding the product

It is likely that these ladies will send slips with the written word, in making a demand for this class of goods. It is most unlikely that if Blotex napkins are supplied for Kotex, such ladies will accept them, thinking that the goods are identical. Certainly, the goods may be accepted as the best possible substitute, or as a distinct trade product serving the same purpose But that is not the test. It is whether the casual or relatively unwary customer of the particular class of goods, is likely to be deceived or confused by the deceptive phonetic or orthographic similarity, into accepting goods of one brand for the other, under the erroneous impression that they are identical In our view, such a possibility can be totally ruled out in this case, considering the class of persons who would be the customers in respect of these goods and what can be reasonably expected of them.

Two other matters may be immediately cleared up. It appears that there was some prior proceedings, when there was an attempt to register a product, namely Beautex, in respect of the same class of goods, and the registry was refused. We are unable to draw any inference from this, except that, on the facts of that enquiry, the concerned authorities thought that the registry ought not to be permitted in accordance with the principles of the Trade Mark Law. The other point is the one that we have already referred to, that their Lordships of the Supreme Court refused registry with regard to a pharmaceutical preparation, where the respective words were *Lakshmandhara* and *Amrithdhara* But it has to be noted that the customers in respect of indigenous medical preparations of that character, will be a very different class, with very different attributes. They may well be villagers, with little or no education, and easily likely to be deceived or confused, even though the phonetic similarity related only to the latter part of the phrases in question.

Under these circumstances, and applying the principles that we have earlier referred to, we conclude that the learned Judge (Venkatadri, J.) was right in declining to interfere with the registration of the word Blotex on behalf of the firm of respondents, descriptive of this character of goods. The Letters Patent Appeal is therefore dismissed with costs.

V.M.K. *Letters Patent Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI.

K. Viswanathan and another .. *Petitioners**

v.

K. Ganapathi Iyer .. *Respondent.*

Partition Act (IV of 1893), section 4—Compulsory sale of the share of the stranger purchaser to members of the undivided family—If violates Article 19 (1) (f) of the Constitution of India (1950)—" Undivided family "—Meaning of.

The words " undivided family " in section 4 of the Partition Act (IV of 1893) means a family which has not divided the dwelling house by metes and bounds. These words have no reference to the status but to the factum of there being no division actually as between the members of the family to which the house belongs.

Though section 4 of the Partition Act in so far as it provides for a compulsory sale of the share of the stranger purchaser to one or more of the members of the family who apply for the same is a restriction on the right to hold and dispose of the property, the restriction being a reasonable one and also being one in public interest, it is not violative of Article 19 (1) (*f*) of the Constitution.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Munsif, Madurai Town in I.A No. 800 of 1964 in O S. No. 65 of 1958.

S. Gopalaratnam, for Petitioners.

M. Srinivasan and *R. Gopalaswami Iyengar,* for Respondent.

The Court made the following

ORDER.—The petition is directed against an order of the District Munsif of Madurai Town made on an application by defendants 5 and 6 who are petitioners in this case under section 4 of the Partition Act, 1893. It is common ground that the plaintiff-respondent is entitled to an undivided half share in the dwelling house in which the petitioners own a third share. The plaintiff is a stranger for all practical purposes though Counsel for the respondent would say that he is a distant relative. The application was for sale of the half share to the petitioners The Court below dismissed it on the ground that as early as in 1929 the family of six brothers became divided in status and on account of that fact section 4 of the Partition Act would be inapplicable. The Court below was asked to decide as to whether the house was capable of partition but it stated that the question could be decided only after the receipt of the Commissioner's report.

It is argued for the petitioners and I think, quite rightly, that the Court below misdirected itself as to the applicability of section 4 to the facts of this case. Section 4 (1) says where a share of a dwelling house " belonging to an undivided family " has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf. That the plaintiff is not a member of the family is not in dispute. The suit which is instituted by him is one for partition of his half share. The only question, therefore, is whether the dwelling house belonged to the undivided family. The Court below construed the words " undivided family " in the sense of a joint Hindu family whose status as such remains intact. Obviously this construction is erroneous. The

*C R.P. No 1532 of 1966. 4th August, 1967.

section is applicable not merely to the Hindu Community but also to other communities and that being the case the words "undivided family" has no reference to the status but to the factum of there being no division actually as between the members of the family to which the house belongs. Recently, Natesan, J., in *Ramaswami Pillai* v. *Subramania Pillai*[1], expressed a similar view. The learned Judge said:

"The words 'undivied family' in section 4 of the Partition Act have been held by a series of decisions to mean simply a family which has not divided the dwelling house by metes and bounds. A Hindu joint family divided in status will still be an undivided family *qua* dwelling house for purposes of the Partition Act, if there has been no division of the dwelling house by metes and bounds."

With respect, I entirely share this view of the scope of the words "undivided family" in section 4. It follows, therefore, that the Court below was wrong in proceeding upon the view that section 4 was inapplicable to the facts.

For the respondent the order of the Court below is supported by a contention that section 4 offends Article 19 (1) (*f*) of the Constitution. I do not think that the contention is well-founded. It is true that section 4 in so far as it provides for a compulsory sale of the share of the stranger purchaser to one or more of the members of the family who apply for the same is a restriction on the right to hold and dispose of the property. But the restriction clearly appears to be reasonable and also in public interest. In the context of the law of pre-emption, *Bhauram* v. *Baljnath*[2], held that a right of pre-emption in favour of a co-sharer of a dwelling house would be reasonable restriction in public interest. The Court held :—

"On the whole a right of pre-emption based on co-shareship is a reasonable restriction on the right to acquire, hold and dispose of the property and is in the interests of the general public."

This principle finds recognition again in *Santram* v. *Labh Singh*[3]. Counsel for the respondent, however, says that unlike in the case of pre-emption in favour of a co-sharer here the stranger is compelled under section 4 when he wants partition and separate possession of his share to sell that portion to the other co-sharers and this makes a difference and would render section 4 unreasonable. To my mind, substantially on principle there appears to be no difference between a case of pre-emption in favour of a co-sharer and the direction which a co-sharer is entitled to get under section 4 against the stranger purchaser in respect of a share in the family dwelling house. The petition is allowed. No costs.

V.M.K. *Petition allowed.*

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1. (1966) 2 M.L.J. 132: I.L.R. (1967) 1 Mad. 602.
2. (1962) 3 S.C.R. (Supp.) 724. A.I.R. 1962 S.C. 1476.
3. (1965) 2 S.C.J. 6: (1964) 7 S.C.R. 756: A.I.R. 1965 S.C. 314.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P S KAILASAM.

G. Ramanujam .. *Petitioner**

v.

The Zonal Manager, Life Insurance Corporation, Madras, and another .. *Respondents.*

Constitution of India (1950), *Article* 226—*Proceedings under—When would be available against a statutory corporation in regard to proceedings against its employee.*

Domestic Tribunal—Proceedings of—Rule of natural justice—Failure to give a fair Opportunity to the party against whom enquiry is conducted—When liable to be quashed.

It is now well settled that in this country the writ proceedings under the provisions of the Constitution would be available against breach of any of the Statutory provisions by a public body, even though the relationship between the aggrieved person and the statutory body may be that of an employee and employer under a contract of service.

Francis v. *Municipal Councillors*, (1962) 3 All E R. 633 and *Vidyodaya University of Ceylon* v. *Silva*, (1964) 3 All E.R. 865, referred and distinguished.

Ram Babu v. *Divisional Manager, Life Insurance Corporation*, A.I.R. 1961 All. 502, held not good law *State of Uttar Pradesh* v. *Babu Ram*, (1961) 2 S.C R. 679 : A.I.R. 1961 S.C 751, *Life Insurance Corporation* v. *Sunil Kumar Mukherjee*, (1964) 1 L.L.J. 482. *T.C M. Pillay* v. *Indian Institute of Technology*, I L R. (1965) 2 Mad. 24; *Mafatlal Barot* v. *Divisional Controller, State Transport Mehsana*, A I.R. 1966 S.C. 1364; *D L. Board, Calcutta* v. *Jaffar Imam*, (1966) 1 S C J. 332: (1965) 3 S C.R. 453 : A.I.R 1966 S.C. 282, Followed.

It is no doubt true that Domestic Tribunals exercising quasi-judicial functions are not Courts and they are not bound to follow the strict procedure and rules of evidence prescribed for trial of actions in Courts of law They are not liberty to obtain information and material from all sources and use the same at an enquiry subject of course to the condition that they should not act on any such information which they may receive unless they put it to the party against whom it is to be used and give him a fair opportunity to explain it. What is fair opportunity must depend on the facts and circumstances of each case. Where witnesses are not examined at the enquiry in the presence of the person charged, but statements made by such witness are used at the inquiry he should be given a copy of the statements made by witnesses and which are to be used at the inquiry, well in advance before the enquiry begins. He should also be given an opportunity to cross-examine such witnesses and an opportunity to examine his own witnesses and explain the case against him. Where the enquiry officer merely put questions and recorded answers and the person charged was not made aware of the fact that he would be entitled to cross examine the witnesses on the statements made by them the proceedings would be vitiated and an order of dismissal based on such an enquiry is liable to be qushed.

Case-law referred.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a Writ of *certiorari* calling for the records connected with

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* W. P. No 348 of 1966. 25th August, 1967.

the order of the Zonal Manager, Life Insurance Corporation of India, Madras, dated 29th April, 1965, dismissing the petitioner herein from service as confirmed by the order of the Chairman, Life Insurance Corporation, Bombay, dated 3rd December, 1965, and communicated by P.Executive Director (P) of the Life Insurance Corporation of India by his Ref. Personal /C/DSS-32, dated 4th December, 1965, and quash the said order and made therein.

Mohan Kumaramangalam for *Dasappan* and *R Ganesh*, Advocate. for Petitioner.

V. K Thiruvenkatachari for *K C. Jacob*, *S K L Ratan* and *R. Vedantam*, Advocates for Respondents.

The Court made the following

ORDER.—The petition is filed by the Assistant Branch Manager of the Life Insurance Corporation of India, for the issue of a writ of *certiorari* calling for the records connected with the order of the Zonal Manager, Life Insurance Corporation of India, Madras, dated 29th April, 1965, dismissing the petitioner from service as confirmed by the order of the Chairman, Life Insurance Corporation of India, Bombay, dated 3rd December, 1965.

The petitioner joined the New India Assurance as organiser in the year 1955 and was absorbed in the said Corporation as a Development Officer when the Corporation was established in 1956 He was promoted as Class I officer in September, 1962. The petitioner was served with a chrarge memo containing two charges on 20th November, 1964 He filed a written statement to the charge memo on 3rd December, 1964, denying the charges On 16th December, 1964, Sri S T.V. Chari, was appointed as Enquiry Officer On 12th January, 1965, the Divisional Manager framed an additional charge and an enquiry was conducted between 18th to 24th January, 1965. On 5th April, 1965, a show cause notice was issued to the petitioner to which the petitioner sent his rely on 15th April, 1965. The Zonal Manager dismissed the petitioner by his order dated 29th April, 1965, and an appeal to the Chairman was also rejected on 3rd December, 1965.

Mr. Mohan Kumaramangalam, learned Counsel for the petitioner, submitted that the proceedings of the Corporation are vitiated by the fact the principles of natural justice were not observed in the enquiry conducted against the petitioner. Secondly, he submitted that the authorities relied on a letter written by the Accounts Officer Natarajan as substantive evidence, without affording an opportunity to the petitioner to question about the letter relied on. Thirdly he submitted that the Enquiry Officer relied on a confessional statement made by steno Natarajan in an enquiry conducted against him without giving an opportunity to the petitioner to cross-examine the steno Natarajan Mr. V K. Thiruvenkatachari, learned Counsel for the Life Insurance Corporation of India, took a preliminary objection to the maintainability of the writ petition on the ground that an order of dismissal by the Life Insurance Corporation of India, is not liable to be interfered with in writ proceedings

In order to appreciate the contentions of the Counsel, the material facts may be set out The Zonal Officer wrote a confidential letter to the Divisional Manager, Life Insurance Corporation of India, Mathurai, enclosing C. R. 7 and C. R. 8 forms and also the proforma, for lapsed details. The Divisional Manager was asked to submit the particulars for deciding the question of confirmation of the petitioner as an Assistant Manager The Divisional Manager was asked to send the report in a cover marked "Secret to be opened by the addressee only." This letter was received at the office of the Divisional Manager. Contrary to the instructions, a letter was sent from the divisional office to the petitioner requiring the petitioner to furnish the details called for by the Zonal Officer. The petitioner came to Mathurai and collected the information from the branch office and sent the data sheets to the Divisional Manager, Life Insurance Corporation of India, Mathurai. It was subsequently found that the figures furnished regarding the number of policies

that lapsed, were not correct. By a letter dated 30th June, 1964, the petitioner was asked to explain the difference in figures given by him and the figures that were reported by the branch office The petitioner replied on 5th July, 1964 He stated that on receipt of the letter from the divisional office on 19th July, 1963, he went to the office of the Divisional Manager, Mathurai on 25th July, 1963, and collected the information and furnished the figures that were given to him by the branch office to the Divisional Office and returned to Tirunelveli.

Three charges were framed against the petitioner which may be extracted in full:

1. That while you functioning an Assistant Branch Manager (Developement). Tirunelveli called at Madurai Branch Unit No. 1 on 25th July, 1963, to collect some information regarding your lapses and not finding the Branch Manager requested the Assistant in the Development section of the Branch to give the figures required and in doing this you have done so deliberately with a view to influence the Assistant of the Branch Office not to give the correct figures with regard to lapses but such figures which would be favourable to you and which will not be an impediment for securing your confirmation as Assistant Branch Manager (Development)."

2. And you are also charged for acting in a high handed manner ignoring the usual procedure in regard to collection of data from the office through proper channel. "And thereby committed an act detrimental to the interests of the Corporation."

3 That while you functioning as Assistant Branch Manager in 1963 connived with others to see that wrong information with regard to the lapses is given in the data sheet sent to the Zonal Office for considering you confirmation as Assistant Branch Manager (Development), and in doing so, you have committed a serious misconduct and acted in a way detrimental to the interests of the Corporation. The Enquiry Officer acquitted the petitioner of the first charge, but found him guilty of charges 2 and 3 It is unnecessary to discuss the merits regarding charges 2 and 3, as the submission on behalf of the petitioner is that the principles of natural justice had not been observed by the Enquiry Officer. The procedure adopted in the enquiry is stated by the Enquiry Officer in his report. The Divisional Manager framed charges against Sri R. Natarajan, G Ramanujam, the petitioner and one P. R. Rajagopalan of Tirunelveli. An additional charge was also framed against them and the Divisional Manager was directed to enqure into the additional charge also. At the enquiry, the Corporation was represented by Sri S. R. Iyer, Assistant Zonal Officer. Mr. Iyer, presented the case in respect of each charge-sheeted persons by reading a prepared statement. Copies of Written Statement were read out by Mr Iyer Exhibits were filed by him. The proceedings of the Enquiry Officer disclosed that the petitioner as well as the three other persons charged and Mr. S. R. Iyer had signed every page of the evidence. The Enquiry Officer did not follow the normal procedure of examining the prosecution witnesses and allowing the petitioner or other persons to cross-examine those witnesses, followed by an opportunity to the petitioner to explain his case and examine defence witnesses. The Enquiry Officer Mr M R. Aiyar, questioned the petitioner and the other persons charged regarding the various allegations and recorded their answer. The enquiry was conducted on the 18th and 19th January, 1965, and is recorded inpages from 125 to 229 of the typed sets of documents filed by the Counsel, for the respondent.

The case for the Life Insurance Corporation of India against the petitioner is briefly as follows :—

The petitioner came to Madurai and without seeing the officer, who wrote to him the demi official letter calling for the completed forms contacted the assistant, Thirumalai and collected the data and took them to the divisional office where the *proforma* figures were manipulated by the steno Natarajan for the purpose of giving lapsed figures to the advantage of the petitioner. It is admitted that the

lapsed figures, which were subsequently found to be not correct, are in the handwriting of the steno Natarajan. The statement of the steno Natarajan in the enquiry conducted against him was that he erased totally all the entries in the columns (*d*) (*i*) and (*d*) (*ii*) of the *proforma* Steno Natarajan also admitted that he did manipulate the lapsed figures. The Enquiry Officer was of the view that the Steno Natarajan would not have altered the figures except with a view to oblige the petitioner and that the petitioner could have been definitely aware of the revision of the figures by steno Natarajan The steno Natarajan was not examined as a prosecution witness in the enquiry against the petitioner. The statement, which is relied on by the Enquiry Officer against the petitioner was made by steno Natarajan in the enquiry against steno Natarajan in which he made the confession. After the confession was made by steno Natarajan when the enquiry against the petitioner was recommenced on 24th January, 1965, the Enquiry Officer has recorded as follows :—

> "Mr. Ramanujam, after your examination, which lasted till day before yesterday, I have been conducting an enquiry into the charges framed by the Divisional Manager against Mr. Natarajan and in the course of the enquiry yesterday, Shri Natarajan made a certain deposition In the light of that deposition, I felt I should recall you for further examination in connection with the charges against you and it was for this reason that I telephoned to you yesterday, asking you to attend the enquiry today."

A portion of steno Natarajan's confession in the enquiry against him was read out to the petitioner. After the statement was read out, the steno Natarajan was asked whether the petitioner was with him throughout. The steno Natarajan answered that the petitioner was with him when the incident of the 25th July, 1963, took place. Steno Natarajan further stated that the Assistant Divisional Manager, Subbiah, was also present till the end of this process which ended at 5 P.M. on 25th July, 1963. Then the Enquiry Officer, put the confessional statement of steno Natarajan to the petitioner and asked for his explanation. The Enquiry Officer stated to the petitioner that according to the steno Natarajan, the petitioner discussed the matter with the Assistant Divisional Manager, Subbiah, in his room and that steno Natarajan was sent for by the Assistant Divisional Manager, Subbiah, and the petitioner found that the lapsed figures were unfavourable to the petitioner and all these matters were discussed and at the instigation of Subbiah in the petitioner's presence, steno Natarajan was asked to correct the figures, which he did. In reply, the petitioner, stated that he had deposed in detail previously and he did not want to add anything further. He reiterated that he came to the Branch Office and showed the letter and the *proforma* and the assistant furnished figures and he took the forms to the Divisional Office at about 4 00 P M and met the Assistant Divisional Manager and according to his instructions, he handed over the *proforma* to steno Natarajan. The procedure in accepting the confessional statement of R. Natarajan made in the enquiry against him as substantive evidence in the enquiry against the petitioner is questioned Further it is submitted that the petitioner was not given an opportunity to cross examine the steno Natarajan. It is clear from the proceedings that steno Natarajan was present during the enquiry. But the petitioner was not asked whether he would like to cross-examine steno Natarajan. As already stated, the procedure of examining the prosecution witnesses, cross-examining them and giving an opportunity to the petitioner to adduce defence evidence was not followed But the whole proceedings were conducted by the Enquiry Officer and Mr. Iyer putting questions to the various persons including the petitioner. It may be noted that according to the confession of steno Natarajan, Subbiah, Assistant Divisional Manager was present, and that it was decided that the figures should be altered to suit the requirements of the petitioner. In the enquiry report relating to the petitioner the presence of Subbiah is not mentioned at all. But in the report relating to steno Natarajan, the presence of Subbiah is not accepted.

Another circumstances, which is submitted as violative of the principles of natural justice, is the reliance by the Enquiry Officer on the statement of R. Natarajan, the Assistant Divisional Manager, Accountant in his letter dated 15th February, 1965, that the statement of the petitioner that the Accountant asked him to see steno-Natarajan and hand over the forms to him for further attention is not correct. This denial was made by Natarajan or the accounts branch by his letter dated 15th February, 1965, after the enquiry against the petitioner was closed. The petitioner had no opportunity to explain this circumstance against him

The Supreme Court has laid down in *State of Mysore* v *Shivabasappa*[1], that the Domestic Tribunals exercising quasi-judicial functions are not Courts and therefore, they are not bound to follow the procedure prescribed for trial of actions in Court, nor are they bound by a strict rules of evidence They are at liberty to obtain all information material for the points from all sources, but should not act on any information which they may receive unless they put it to the party against whom it is to be used and give him a fair opportunity to explain it What is the fair opportunity must depend on the facts and circumstances of each case. Generally the procedure followed is that the petitioner would have an opportunity to adduce all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence and that he should be given an opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them. The Supreme Court held that though normally the examination of the witness will in its entirety take place before the party charged, who will have full opportunity of cross-examining him, the enquiry will not be vitiated if the statement given by the witness previously behind the back of the party is put to him and admitted in evidence and a copy thereof is given to the party and he is given an opportunity to cross-examine him. It was held that it was unnecessary that the witness should be made to repeat word by word, and sentence by sentence what all he stated previously. The requirement of natural justice would be fulfilled, if the petitioner is given an opportunity to explain the case against him, to adduce evidence in support of his case and to cross-examine the witness deposing against him The view expressed by the Supreme Court cited, supra has been reaffirmed in *Kesoram Cotton Mills* v. *Gangadhar*[2], and in *Khardah & Co.* v *Its Workmen*[3], in dealing with an enquiry before the Industrial Tribunal The Supreme Court after stating that the enquiry should be conducted in the manner stated in *State of Mysore* v *Shivabasappa*[1], observed that the minimum that is expected where witnesses are not examined from the very beginning at the inquiry in the presence of the person charged is that the person charged should be given a copy of the statements made by the witnesses which are to be used at the inquiry well in advance before the inquiry begins In *Khardah & Co.* v. *Its Workmen*[3], the Supreme Court dealing with the case of workmen under the Industrial Disputes Act expressed its opinion that it is desirable that all witnesses on whose testimony the management relies in support of its charge against the workmen should be examined in his presence. The decisions in *Kesoram Cotton Mills* v. *Gangadhar*[2], and *Khardah & Co.* v. *Its Workmen*[3], were rendered with regard to the disputes under the Industrial Disputes Act In the case of domestic enquiry by an institution like the Life Insurance Corporation of India, the decision of the Supreme Court in *State of Mysore* v. *Shivabasappa*[1], would be applicable and the principles of natural justice could be said to have been observed, if the petitioner was given an opportunity of cross-examining the witnesses examined by the opposite side and an opportunity to examine his own witnesses and to explain the case against him.

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1 (1963) 2 S C R 943 (1963) 2 S C J 104 (1963) 2 L L J 371.
A I R 1963 S C 375

2. (1964) 2 S C R 809 (1965) 1 S C J 71

3 (1964) 3 S C R 506 · (1965) 1 S C J. 97 : (1963) 2 L L J. 452 at at 456.

It has to be determined whether on the facts of the case, a fair opportunity was given to the petitioner. The material on which the petitioner is found guilty, is the confessional statement made by the steno-Natarajan and the denial by the accounts Natarajan. So far as the confessional statement of steno-Natarajan is concerned, though the confessional statement made by the steno-Natarajan was put to the petitioner, it is not tested by cross-examination. The entire proceedings were conducted by the Enquiry Officer and the petitioner as well as others were only answering the questions put to them and the petitioner was not made aware that he would be entitled to cross-examine steno-Natarajan on the confession he had made and on which the Life Insurance Corporation of India wants to rely for proving the charges. It may also be noted that steno-Natarajan has mentioned about the presence of Subbiah during the transaction and no reference is made about the presence of accounts Natarajan in the Enquiry Officer's report. In the circumstances I am not satisfied that a reasonable opportunity was given to the petitioner to cross-examine the steno-Natarajan on the material on which reliance is placed upon by the Corporation. Further, the Corporation has undoubtedly relied on the denial of the accounts Natarajan that he did not tell the petitioner to see steno-Natarajan and hand over the forms to him for further attention On the basis of this denial. The statement of the petitioner is rejected. This denial was obtained only after the enquiry was completed and reliance should not have been placed on this denial without giving an opportunity to the petitioner to explain it. On a consideration of the facts of the case, I am not satisfied that the petitioner was given a reasonable opportunity to defend all the charges framed against him I must also record that the Enquiry Officer conducted the enquiry without any prejudice and was anxious to give a fair opportunity to the petitioner to explain the case against him But by observing the procedure which he did, he had unwittingly denied the petitioner a fair opportunity to defend himself.

The order of dismissal is therefore, set aside The Life Insurance Corporation is at liberty to frame fresh charges and conduct a fresh enquiry against the petitioner.

The preliminary objection raised by Mr. V. K. Thiruvenkatachari that a proceeding by way of writ petition is not available against an order of dismissal passed by a body like the Life Insurance Corporation of India may also be considered. He referred to Halsbury's Laws of England, Third Edition, Vol. 25, page 519, para. 991 and submitted that the dismissal of a servant even if it is otherwise than in accordance with the procedure in his contract of service is in effect termination of contract and the servant cannot claim that the contract had not been validly terminated and his remedy is only by way of damages. He also referred to two English decisions reported in *Francis* v. *Municipal Councillors*[1], and *Vidyodaya University of Ceylon and others* v. *Silva*[2] In *Francis* v. *Municipal Councillors*[1], the Privy Council held that a declaration to the effect that the contract of service still subsisted would rarely be made and would not be made in the absence of special circumstance because of the principle that the Courts would not grant specific performance of contracts of service. The Court distinguished the case of a *Vine* v *National Dock Labour Board*[3], on the ground that the circumstance in *Vine's case*[3] was very special where the dismissal was shown to have been without proper authority and the labourer should have the benefit of the declaration that he was still in the employment of the National Dock Board. In *Vidyodaya University of Ceylon* v. *Silva*[2], the Privy Council held that the contract of employment made by the University with the teachers did not involve more than ordinary contract between the master and the servant and that the procedure by a writ of *certiorari* was not available. The English decisions relied on by the learned Counsel for the respondents would not advance his contention for the Supreme Court as well as the Madras High Court have uniformly held that a writ would be available against breach of any of the statutory provisions by a public body The only case of Indian High Courts,

1. (1962) 3 All E R. 633 (P C).
2. (1964) 3 All E R. 865 (P C).
3. (1956) 1 All E R 1.

which is in favour of the respondents, in *Ram Babu* v *Divisional Manager, L.I C.*[1]. The Court held that an employee of the Life Insurance Corporation could not maintain a writ of *certiorari*, a relationship between the employee and the Corporation was one of master and servant and the general law of master and servant applies to the case. This decision cannot be held to be good law in view of the subsequent pronouncement of the Supreme Court in *State of Uttar Pradesh* v *Babu Ram*[2] It has been held that the rules made under a statute must be treated for all purposes of construction or obligation exactly as if they were in the Act, and are to be judicially noticed for all purposes of construction or obligation. In *Life Insurance Corporation* v. *Sunil Kumar Mukherjee*[3], the Supreme Court dealing with the case of Life Insurance Corporation of India held that where the services of such employees were terminated on the ground that their performance was found poor by the committee specially appointed for the purpose without any enquiry or without giving any opportunity to the concerned employee, the orders must be held invalid.

The Madras High Court in *T C. M. Pillay* v *Indian Institute of Technology*[4], has held that the dismissal of an Assistant Professor of Metallurgy in the Indian Institute of Technology without observing the mandatory procedure prescribed under the statute would be a nullity and liable to be interfered with in a writ petition under Article 226 of the Constitution of India In *V Ramiah* v *The State Bank of India*[5], the Court has held that an order of dismissal by the State Bank is liable to be interfered in writ proceedings This Court has held that a writ is available against the Acts of Life Insurance Corporation in *Narayanaswamy Naidu* v. *Krishnamurthy*[6] in Writ Petition No. 53 of 1959

Recently the Supreme Court has laid down that the Courts can interfere with the orders of dismissal by the Road Transport Corporation in *Mafatlal Barot* v. *Divisional Controller, State Transport, Mehsana*[7], and in *D L Board, Calcutta* v. *Jaffar Inam*[8]. In the face of the over-whelming authorities the preliminary objection raised on behalf of the respondent that the dismissal of the petitioner by the Life Insurance Corporation is not amenable to the writ jurisdiction of this Court, will have to be rejected.

In the result, the writ petition is allowed. The Life Insurance Corporation of India is at liberty to frame fresh charges and conduct an enquiry and proceed according to law. There will be no order as to costs.

R.M. *Writ petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ISMAIL.

Thangayya Vanniar .. *Appellant**

v.

Ramaswamy (minor) represented by his mother Papathi Ammal, and another .. *Respondents.*

Madras Cultivating Tenants Protection Act (XXV of 1955), section 6-A—Transfer of suit to Revenue Court under—Requirements to be fulfilled.—Expression "entitled to the benefits of the Act"—Meaning of.

The only reasonable construction of section 6-A of the Madras Cultivating Tenants Protection Act appears to be that as soon as the civil Court finds that the tenant is a cultivating tenant coming within the scope of the Act, and also eligible to apply for and obtain one or more of the benefits provided in his favour by the

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1 A I R 1961 All 502
2 (1961) 2 S C R 679 A I R 1961 S C 751
3. (1964) 1 L L J 482
4. I L R (1965) 2 Mad 24.
5 W A. No. 180 of 1963
6 I L R (1958) Mad 513 (1958) 1 M L.J. 367
7 A I R 1966 S C 1364
8 (1965) 3 S C R 453 (1966) 1 S.C J 332 : A I R. 1966 S C 282

* S.A. Nos. 906 and 909 of 1963. 23rd November, 1967.

Act, the requirement of the expression "a cultivating tenant entitled to the benefits of this Act" in section 6-A will be satisfied It is not a condition precedent for the exercise of the power of transfer by the civil Court, that the civil Court must actually conduct an enquiry and determine the very point or issue that is required to be determined by the Revenue Divisional Officer under the provisions of the Act. Consequently, the expression "entitled to be benefits of the Act" in section 6-A has reference to the eligibility of the tenant to come within the scope of the Act and claim one or more of the benefits conferred on him by the Act and has no reference to the particular set of circumstances and facts which had been urged by the landlord, as taking away the protection available to the tenant from eviction.

No decision of the Madras High Court has held that before transferring a suit for possession to the Revenue Divisional Officer under section 6-A, the civil Court must hold an enquiry as to whether the cultivating tenant in question is one falling under one or more of the various clauses enumerated in section 3 (2) and arrive at a finding that he does not so fall Such a construction of section 6-A will yield the result that the civil Court after having recorded a finding that the cultivating tenant is not liable to be evicted under the provisions of section 3 (2) of the Act, transfers the suit to the Revenue Divisional Officer to enable him to conduct an enquiry afresh for the purpose of finding out whether the tenant is liable to be evicted under the provisions of section 3 (2) of the Act or not. To hold that the civil Court can conduct an enquiry and find out whether the cultivating tenant falls within one or more of the clauses of section 3 (2) or not and if he does so fall, pass a decree for possession against him, since on such a finding he is not entitled to the benefits of the Act, is to fly in the face of the prohibition contained in sections 3 (1) and 6 of the Act.

Case-law discussed.

Appeals against the Decree of the District Court, West Thanjavur, Thanjavur, dated 30th March, 1963, in Appeal Suit Nos. 179 and 197 of 1962 preferred against the decree of the Court of the District Munsif of Tiruvaiyaru in Original Suit No. 111 and 112 of 1961 respectively.

T. R Srinivasan, for Appellant

K N. Balasubramanian, for Respondent.

The Court delivered the following

JUDGMENT.—These two appeals arise out of two suits filed by the respondents herein against the appellant for the recovery of possession of certain lands in possession of the appellant with past and future profits Admittedly the lands in the possession of the appellant originally belonged to Ammani Ammal and Vijayathammal of Kabistalam and the appellant herein was a tenant under them in respect of the lands in question The case of the plaintiffs in the suits was that the plaintiffs, who were minors and were represented by their mother Papathi Ammal, the next friend, were the purchasers of the lands in question from their previous owners under two sale deeds dated 29th December, 1956, and registered on 29th April, 1957; the appellant was formerly cultivating the lands on yearly lease under the vendors of the plaintiffs, the appellant despite the demand did not pay the income to the plaintiff's next friend for the enjoyment of the suit lands after the purchase by the plaintiffs, though as per custom, contract and usage the yearly income should be paid in two equal instalments one by 31st October, and the other by 31st March of every fasli; the plaintiffs sent a notice dated 12th December, 1960, to the appellant demanding the income but the appellant through his Counsel sent a reply notice denying the title of the plaintiffs and expressly stating that there was no relationship of landlord and tenant between the parties and claiming title in himself; in view of this, there had been forfeiture of tenancy and the appellant was liable to be evicted. However in the written statement filed by him, the appellant claimed that he was a cultivating tenant and consequently the suit had to be transferred to the Revenue Court pursuant to the provisions contained in section 6-A of the Madras Cultiva-

ting Tenants Protection Act (XXV of 1955) The learned District Munsif who tried the suits together came to the following conclusions : (1) that the appellant was a cultivating tenant, (2) that the appellant had denied only the tenancy agreement between the plaintiff's guardian and himself as set out in Exhibit A-1 the notice sent by the plaintiff's mother and beyond that he did not deny the title of the original lessors or the derivative title of the plaintiffs under the sale deeds, (3) that the Civil Court had no jurisdiction to try the suit so far as the relief of possession was concerned and (4) that the Court had jurisdiction to try the suit so far as the relief of arrears of rent was concerned since the plaintiffs had claimed arrears of rent as past profits at the same rate at which the defendant was liable to pay under the terms of the original lease. In view of these findings, the learned District Munsif passed a decree in favour of the plaintiffs for the suit amount with proportionate costs and the relief of possession was negatived, and the suits were dismissed without costs in this respect. Against this judgment and decree of the learned District Munsif, the respondents herein preferred two appeals to the learned District Judge of West Thanjavur. The learned District Judge by judgment and decree dated 30th March, 1963, reversed the decision of the learned District Munsif and decreed the suits of the respondent. Hence the present second appeals.

Before considering the contentions put forward by the parties before me, it is necessary to refer to the grounds which found favour with the learned District Judge, on the basis of which he allowed the appeals of the respondents and decreed their suits. The learned District Judge came to the conclusion that by Exhibit A-2, the reply notice sent by the appellant herein, the appellant had denied the title of the plaintiffs and also the subsistence of the relationship of tenant and landlord between him and the plaintiffs; because of this the appellant herein had denied himself the benefits of the Madras Cultivating Tenants Protection Act, 1955 The learned District Judge went a step further and held that the defendant (appellant) falsely alleged that he was not in arrears of rent and had paid the entire rent was one of the reasons for holding that he was not entitled to the benefits of the Madras Cultivating Tenants Protection Act. The entire judgment of the learned District Judge proceeds on the assumption that the appellant was a cultivating tenant but because of the denial of the title of the plaintiffs, he had lost the benefits to which he would have been otherwise entitled under the Madras Cultivating Tenants Protection Act, 1955.

Mr. T R. Srinivasan, learned Counsel for the appellant put forward two contentions. The first contention is that once the Courts below found that the appellant was a cultivating tenant they had no further jurisdiction to proceed with the matter and that under section 6-A of the Act they had to transfer the suits to the Revenue Court for disposal according to the provisions contained in that Act. The second contention is that even assuming that the Civil Court had any jurisdiction to proceed further with the matter, the finding of the learned District Judge that by Exhibit A-2 the appellant had denied the title of the plaintiffs is not warrnted by the terms of Exhibit A-2 itself or by Exhibit A-2 read with Exhibit A-1 the notice sent by the guardian of the plaintiffs On the other hand, Mr. Balasubramanian, appearing for the respondents, did not dispute the finding that the appellant was a cultivating tenant He sought to support the decision of the learned District Judge on two alternative grounds. The first ground is that the relevant section 6-A uses the expression " a cultivating tenant entitled to the benefits of this Act " and that consequently before proceeding to transfer any suit pursuant to the provisions of section 6-A the Court will have to go into the question whether the appellant was entitled to the benefits of the Act, namely the protection from eviction which alone is relevant for the purpose of the suit and the Court had therefore jurisdiction to go into the question The alternative ground urged by Mr Balasubramanian is that, in any event, the appellant by Exhibit A-2 had denied the existence of the relationship of landlord and tenant between the plaintiffs and himself and thereby renounced the character as a tenant ; if that be the case, the question of his being entitled to the benefits of the Act did not arise and consequently

the lower appellate Court was justified in decreeing the suits of the respondents in entirety I shall first dispose of the second contention of Mr. Balasubramanian. I have already pointed out that the learned Counsel did not dispute the finding that the appellant herein was a cultivating tenant. Necessarily that finding implied that he was a cultivating tenant on the date of the suit On the other hand if the contention of Mr. Balasubramanian is to be accepted that will go contrary to that finding. A person cannot be a cultivating tenant and at the same time cannot be said to have lost his character as a tenant. The very finding that he was a cultivating tenant on the date of the suit implies that he had not lost his character as a tenant on that date and he continued to be a tenant. Therefore in my view there is no substance in the alternative contention of Mr. Balasubramanian.

There remains the principal question as to the scope of the jurisdiction of the civil Court for the purpose of acting under section 6-A of the Act It is true that section 6-A uses the expression " a cultivating tenant entitled to the benefits of this Act ". The real point to be considered is what exactly is the meaning of this expression. Obviously section 6-A specifies two kinds of suits only, namely, a suit for possession of or injunction in relation to any land and consequently if the jurisdiction of the civil Court in respect of such suits is to be barred, that must be based upon the fact that those questions have been relegated or left to be determined by some other authority so as to justify the exclusion of the jurisdiction of the Civil Court. Therefore it becomes necessary to find out what exactly is the ambit and scope of this expression occuring in section 6-A of the Act. Section 3 (1) provides that no cultivating tenant shall be evicted from his holding or any part thereof by or at the instance of his landlord, whether in execution of a decree or order of a Court or otherwise. The provision contained in this sub-section is subject to the next succeeding sub-section Sub-section (2) states that subject to the next succeeding sub-section, sub-section (1) shall not apply to a cultivating tenant coming within the scope of clauses (*a*), (*aa*), (*b*), (*c*) and (*d*) enumerated therein. Thereafter sub-section (3) enables a cultivating tenant to deposit in Court the rent under certain circumstances Sub-section (4) is the procedural section dealing with the procedure to be followed by the Revenue Divisional Officer whenever a landlord files an application to evict a cultivating tenant under sub-section (2). The next importtant sections to be noticed are sections 6 and 6-A. According to section 6, no civil Court shall, except to the extent specified in section 3 (3), have jurisdiction in respect of any matter which the Revenue Divisional Officer is empowered by or under this Act to determine and no injunction shall be granted by any Court in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act. Section 6-A states that if in any suit before any Court for possession of, or injunction in relation to, any land, it is proved by affidavit or otherwise that the defendant is a cultivating tenant entitled to the benefits of the Act, the Court shall not proceed with the trial of the suit but shall transfer it to the Revenue Divisional Officer who shall thereupon deal with and dispose of it as though it were an application under the Act and all the provisions of the Act shall apply to such an application and the applicant.

The question for determination in these second appeals is whether immediately the Civil Court found that the appellant was a cultivating tenant it was under an obligation to transfer the proceedings under section 6-A of the Act to the Revenue Divisional Officer or whether it had any further jurisdiction to go into any other matter in relation to the prayer for possession of the land. In this connection several decisions of this Court were brought to my notice by the learned Counsel appearing for both the sides.

The first decision is *Veluchami Naicker* v. *Mouna Guruswami Naicker*[1]. That decision concerned with a suit instituted in 1954 before coming into force of the Act in question for possession of the lands from the tenants. The question that came up for consideration was whether to such a suit the bar of sections 6 or 6-A would apply.

1 (1957) 2 M.L.J 628.

While holding that the bar of section 6 or section 6-A would apply, the learned Judges remanded the suit to the file of the trial Court for the purpose of deciding whether the tenants in that case were cultivating tenants or not since the said question was not decided in the view that the Act did not apply to the suit In the course of the judgment the learned Judges observed at page 629 as follows:

"If the Court decides that the defendants are cultivating tenants entitled to the benefits of the Act, then it shall not proceed with the further trial of the suit but shall transfer it to the Revenue Divisional Officer. If, however, the Court comes to the conclusion that the defendants are not cultivating tenants, then it can proceed with the trial and pass such decree as it may deem fit. . "

It may be noticed that this decision does not say what exactly is meant by the expression "entitled to the benefits of the Act" but merely reproduces the language of the section in making the above observation. The next decision which was brought to my notice is *Ratnasami Mudaliar* v *Ponnammal*[1] A Bench of this Court observed at page 429:—

"Since the question at issue has to be disposed of in accordance with section 6-A in the first instance it is for the civil Court to decide whether the claim put forward by the first defendant that he was a cultivating tenant is correct"

The learned Judges further stated that the procedure to be followed in such cases had been indicated by a Bench of this Court in *Veluchami Naicker* v. *Mouna Guruswami Naicker*[2], referred to earlier. Even this decision does not take the matter any further. The next decision on which strong reliance was placed by Mr Balasubramanian is that of Balakrishna Ayyar, J, in *Kuppuswami* v. *Subramaniaswami Devasthanam*[3] The relevant passage on which reliance has been placed is a follows at page 209:

"Mr. Jagadisa Aiyar argued that in the context the expression 'cultivating tenant entitled to the benefits of this Act' only means a cultivating tenant as defined by the Act. His reasoning was this If you hold otherwise and say that before he can call in aid section 6-A a cultivating tenant must be actually entitled to the benefits of the Act then it means that the cultivating tenant will have to plead, allege and prove what particular benefit or benefits he is entitled to under the Act. Now the jurisdiction in respect of such matters is conferred by other portions of the Act exclusively on the revenue Courts. If this construction is not adopted a civil Court will be called upon to adjudicate on matters which are exclusively reserved for the revenue Courts

There is no doubt force in this criticism but then, the question naturally arises why did the Legislature add the words 'entitled to the benefits of this Act' if it merely intended to say cultivating tenant as defined by the Act. When the Legislature has used certain words I shall not ordinarily be justified in ignoring them. Therefore before the civil Court can transfer a proceeding under section 6-A to the Revenue Court it must be satisfied that the tenant is not merely a cultivating tenant as defined in the Act but also entitled to some benefit or other under the Act."

Even this judgment does not say what exactly is the scope of the expression "entitled to the benefits of this Act" All that this judgment emphasises is that the presence of the expression "entitled to the benefits of this Act" in the section should be taken note of and some meaning must be assigned to it and the expression cannot be ignored. This observation of the learned Judge is amplified by another unreported decision of Anantanarayanan, J (as he then was) in Second Appeal No. 562 of 1959 dated 29th September, 1961. Since the facts of this case are very similar to the facts of the present case, it is desirable to refer to that judgment in some detail.

1. (1958) 1 M L J 427
2 (1957) 2 M.L J, 628.
3 (1958) 1 M L J 208 at 209

In that case, also, there was a suit for recovery of possession of the land in the possession of the tenant with past and future profits on the ground that the tenant had wilfully denied the title of the landlord The learned District Munsif in that case held that the tenant was not entitled to the benefits of the Act and decreed the suit for possession The lower appellate Court also concurred with that conclusion In that case also both the Courts below came to the conclusion that the tenant in that case was a cultivating tenant within the meaning of the Act. But the learned Subordinate Judge on appeal held that the tenant was disentitled to the protection against eviction embodied in section 3 of Act XXV of 1955 for the reason that the appellant there (tenant) wilfully denied the title of the landlord within the meaning of section 3 (2) (*d*) and that this denial was not under a *bona fide* mistake of fact within the meaning of Explanation (1) to section 3 (2) (*d*). After referring to these facts, the learned Judge proceeded to state as follows :

> " First of all, it seems to be very doubtful whether the learned Subordinate Judge had really any jurisdiction to decide this question, once he found that the appellant was a cultivating tenant entitled to the protection of the Act. It is true, as observed by the learned Counsel for the Temple, that the bar of the jurisdiction of the civil Court, embodied in section 6 of the Act, is not an absolute bar. As pointed out by a Bench of this Court in *Venkatachala Odayar* v. *Ramachandra Odayar*[1] it is not the Revenue Divisional Officer who has jurisdiction to grant the relief to the landlord in the matter of recovery of arrears ; it is the civil Court which will be the proper forum in that respect But, indisputably, upon the very wording of section 6, the Civil Court will have no jurisdiction to consider whether a cultivating tenant should be evicted from his holding or not, and whether possession should be delivered of the land to the landlord. Once this question comes into the subject-matter of litigation, and to that extent, the jurisdiction of the Civil Court is specifically taken away, and the Revenue Divisional Officer alone would have jurisdiction. It is perfectly true that, as observed by the same Bench of this Court in *Ramachandra Sastrigal* v. *Kuppuswami Vanniar*[2], before the civil Court transfers a proceeding under section 6-A to the Revenue Court, it has to be satisfied not merely that the tenant is a cultivating tenant as defined in the Act but also that he is entitled to some benefit or other under the Act But the obvious rejoinder to this, upon the facts of the present case, is that the appellant is a cultivating tenant *entitled to some benefit* under the Act, even if, by virtue of a denial of the title, he cannot resist eviction. Admittedly, even in that contingency, the Revenue Divisional Officer is clothed with special powers under the Act to grant time etc. It is only in special cases falling within the scope of section 3, sub-clause (3), which has no application to the present appeal, that the civil Court is expressly clothed with jurisdiction under section 6. With regard to eviction proper, it cannot be denied that the civil Court has no jurisdiction, and that the Revenue Court alone will have jurisdiction. The only requirement is that, in such a case, the tenant must show that he is the cultivating tenant under the Act entitled to some benefit or other, which may even include the benefit of the special procedure enacted under section 3, sub-clause (4) (*b*)."

Thus it will be seen that this decision gives effect to the expression occurring in the section "entitled to the benefits of this Act" but points out that that benefit need not necessarily be correlated to the protection from eviction, which alone is relevant for the suit for possession, but may have reference to any other benefit under the Act. If this is the proper construction of the expression occurring in the section, then it will automatically follow that once the civil Court comes to the conclusion that the tenant is a cultivating tenant entitled to some benefit under the Act, the civil Court has no further jurisdiction to determine the question whether the tenant is liable to be evicted or not

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1. (1961) 74 L W 81 I L R (1961) Mad 333 (1961) 1 M L J 188
2. (1961) 74 L W 167

The next decision which has been referred to and on which much reliance has been placed is the case of *Ramachandra Sastrigal* v *Kuppuswami Vanniar*[1]. In that case, a Bench of this Court has observed as follows at page 341 :

"The plain words of section 6-A of the Act clearly indicate the scope of that provision The suit which is sought to be transferred must be one for possession or injunction in relation to any land The defendant in such a suit can if he is a cultivating tenant entitled to the benefits of the Act have the trial of the suit before the civil Court interrupted and have the suit transferred to the Revenue Divisional Officer. On a transfer being ordered in terms of that section the Revenue Divisional Officer shall deal with and dispose of the suit as though it were an application under the Act Before the section can operate, three conditions must be fulfilled The first is that the defendant must be a cultivating tenant ; the second is that he must be entitled to the benefits of the Act ; the third is that he must on a transfer of the proceeding to the Revenue Divisional Officer be in a position to obtain one or other of the statutory reliefs provided for in his favour under the Act. Without the concurrance of these three conditions no transfer should be ordered by the civil Court under the provisions of section 6-A of the Act "

As the learned Judges themselves observed, these three conditions flow from the language of section 6-A and therefore there cannot be any dispute with regard to the necessity of these three conditions being satisfied cumulatively, so as to enable the civil Court to transfer the suit to the Revenue Court. The point I wish to mention is that even this decision does not indicate what exactly is the scope of the expression "entitled to the benefits of this Act" occuring in section 6-A of the Act, Mr. Balasubramanian invited my attention to a portion of the judgment where the learned Judges had dealt with the decisions of Panchapakesa Ayyar, J , in *Syed Sahib* v *Angamuthu Moopan*[2], and *Subbaratnam Iyer* v. *Pattavarthi Moopan*[3], and held that the view taken by Panchapakesa Ayyar, J., was not correct. But that has no bearing on the point in issue. In those cases Panchapakesa Ayyar, J., had taken the view that the civil Court must arrive at a *prima facie* finding whether the tenant was a cultivating tenant or not and if the *prima facie* finding was that the tenant was a cultivating tenant, the suit must be transferred to the Revenue Court The learned Judges have pointed out that that view is not correct and have observed at page 341.

"Before the civil Court decides not to try a suit it must reach a definite conclusion and must record a comprehensive finding that it has no jurisdiction to deal with the matter. There cannot of course be a summary enquiry by a civil Court on such a vital issue as that of jurisdiction to try the suit "

The next decision on which reliance was placed by Mr. T R. Srinivasan, learned Counsel for the appellant, is that of Natesan, J., in *Krishna Kambar* v *Muthia Thevar*[4] The passage on which reliance was placed is to the following effect at page 241.

"But it is quite different thing when the suit is one for recovery of possession of a land in which the tenant is a cultivating tenant There can be no eviction of the cultivating tenant except in due conformity with the provisions of the Act. The jurisdiction to order eviction is vested only in the Revenue Divisional Officer and the civil Court's jurisdiction is excluded. It will be seen that in such an action when the tenant is in possession and the claim is made by the landlord for possession, once it is found that the tenant is a cultivating tenant, automatically certain benefits flow to him. Even if he is in arrears, the Revenue Court could give him time. The Act places a general embargo on the eviction of cultivating tenants except in accordance with and under the provisions of the Act. The very decision above referred to *Ramachandra* v *Kuppuswami*[1], points out the distinction between suits for eviction and suits for injunction, where the tenant is

1 (1961) 1 M L J 335
2 (1958) 1 M L J 232.
3 (1958) 2 M L J 184
4 (1967) 2 M L J 237 I L R (1967) 1 Mad. 803

out of possession. As observed by Ramachandra Ayyar, J, (as he then was) in *Md. Karimuddin Sahib* v. *Mohambara Naicker*[1], 'therefore before an order for transfer is made the Court should find that it is incompetent to give the relief sought by reason of the Act'. I do not think that the decision in *Ramachandra* v *Kuppuswami*[2], requires a prior specific determination in every kind of suit of the particular benefit to which a tenant is entitled. In a suit for eviction once it is held that the defendant is a cultivating tenant it follows he can claim certain benefits under the Act, as already pointed out * * *. For ordering the transfer in a suit for eviction in my view, the civil Court must find the existence of relationship of landlord and cultivating tenant as defined in the Act between the plaintiff and the defendant and secondly on the proceedings being transferred it must be possible for the Revenue Divisional Officer to order one or other of the reliefs specified in the Act."

Thus it will be seen that this judgment of Natesan, J, follows up the decision of Balakrishna Ayyar, J., in *Kuppuswami* v. *Subramaniaswami Devasthanam*[3], and the decision of Anantanarayanan, J, (as he then was) in the unreported decision in Second Appeal No 562 of 1959 and fully supports the contention of Mr. T.R Srinivasan, learned Counsel for the appellant

On the other hand, Mr. Balasubramaniam strongly relied upon the decision of Kailasam, J., in *Mahalakshmi Ammal* v. *Swaminatha Iyer*[4]. In that case the learned District Munsif found that the fourth defendant was a cultivating tenant within the meaning of section 2 of Madras Act XXV of 1955 but that he was not entitled to the benefits of the said Act, and therefore the suit for eviction was barred under section 6 of the Act, as only the Revenue Divisional Officer was empowered to deal with and determine the question of eviction. That view of the trial Court was affirmed by the appellate Court. It is under those circumstances that the landlord preferred the second appeal and the learned Judge allowed the same. I must point out that the learned Judge who was a party to the decision in *Ramachandra Sastrigal* v *Kuppuswami Vanniar*[2], enumerates the three conditions mentioned therein and points out that those conditions must be fulfilled before the civil Court can transfer the suit under section 6-A of the Act In this case also the learned Judge did not go into the question what exactly is the meaning of the expression "entitled to the benefits of the Act" occurring in the section As pointed out already, the only two decisions which refer to the meaning of this expression, as a cultivating tenant being entitled to some benefit or other under the Act, are the decision of Natesan, J., in *Krishna Kambar* v. *Muthiah Thevar*[5], and the decision of Anantanarayanan, J., (as he then was) in S.A. No. 562 of 1959. The learned Judge (Kailasam, J.), has not held that before transferring the suit, the civil Court must conduct an enquiry and find out whether the protection which the cultivating tenant claims, with reference to the facts and circumstances of the particular case, is available to him or not No doubt, in view of the expression "entitled to the benefits of the Act" occurring in the section, the Court must be satisfied that the cultivating tenant is entitled to some benefit or other under the Act. Otherwise, the very object of barring the jurisdiction the of civil Court will be defeated The purpose of barring the jurisdiction of the civil Court is that the matter sought to be agitated before the civil Court has to be agitated before the special forum created for the purpose If the cultivating tenant is not entitled to some benefit or other under the Act, then there will be no object in transferring the proceedings to the Revenue Divisional Officer. On the other hand, to adopt the consideration that before transferring the suit the civil Court must conduct an enquiry and arrive at a finding as to whether the cultivating tenant is entitled to the protection against eviction, with reference to the facts and circumstances of th case, will lead to an anomalous situation. Let us take this very case. Here, the ground

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1. City Civil Court Appeal Nos 149 of 1955 and C R P No 464 of 1959
2 (1961) 1 M L J 335
3 (1958) 1 M L J 208
4 (1967) 2 M L J 158
5 (1967) 2 M L J 237 I L R (1967) 1 Mad. 803.

on which possession was sought to be obtained was that the appellant had denied the title of the landlord and therefore he was not entitled to remain in possession. Let us assume that the civil Court gives a finding that the tenant is a cultivating tenant and then it also goes into the matter whether he has really denied the title of the landlord or not. If it comes to the conclusion that he has denied the title of the landlord, then according to the interpretation contended for on behalf of the landlords, the suit for possession must be decreed. On the other hand, if it came to the conclusion that the tenant has not denied the title of the landlord, then the civil Court must transfer the proceedings to the Revenue Divisional Officer, who will have to deal with the matter afresh. That is, before the matter goes to the Revenue Divisional Officer there is already a finding by the civil Court that the tenant has not denied the title of the landlord. To hold, under such circumstances, that the suit must be transferred to the Revenue Divisional Officer and he will have to go into the question again, without being in any way bound by the finding of the civil Court that the tenant has not denied the title of the landlord, will lead to an anomalous situation, which could not have been intended by the legislature. Consequently, the only reasonable construction of the section, in my view, appears to be that as soon as the civil Court finds that the tenant is a cultivating tenant coming within the scope of the Act, and also eligible to apply for and obtain one or more of the benefits provided in his favour by the Act, the requirement of the expression will be satisfied. It is not a condition precedent for the exercise of the power of transfer by the civil Court, that the civil Court must actually conduct an enquiry and determine the very point or issue that requires to be determined by the Revenue Divisional Officer under the provisions of the Act. Consequently, the expression "entitled to the benefits of the Act" has reference to the eligibility of the tenant to come within the scope of the Act and claim one or more of the benefits conferred on him by the Act and has no reference to the particular set of circumstances and facts which had been urged by the landlord, as taking away the protection available to the tenant from eviction.

I may point out that no decision of this Court has been brought to my notice which holds that the expression " being entitled to the benefits of the Act " requires a finding by the civil Court that the cultivating tenant in question does not come within the scope of one or more of the clauses enumerated in sub-section (2) of section 3 In other words, no decision of this Court has held that before transferring a suit for possession to the Revenue Divisional Officer, under section 6-A of the Act, the civil Court must hold an enquiry as to whether the cultivating tenant in question is one falling under one or more of the various clauses enumerated in section 3 (2) and arrive at a finding that he does not so fall. Such a construction of section 6-A will yield the result that the civil Court after having recorded a finding that the cultivating tenant is not liable to be evicted under the provisions of section 3 (2) of the Act, transfers the suit to the Revenue Divisional Officer to enable him to conduct an enquiry afresh for the purpose of finding out whether the tenant is liable to be evicted under the provisions of section 3 (2) of the Act or not. To hold that the civil Court can conduct an enquiry and find out whether the cultivating tenant fails within one or more of the clauses of section 3 (2) or not and if he does so fall, pass a decree for possession against him, since on such a finding he is not entitled to the benefits of the Act, is to fly in the face of the prohibition contained in sections 3 (1) and 6 of the Act.

In this case the learned District Judge has decreed the suits on his finding that the defendant had denied the title of the landlords—plaintiffs. The next step in the reasoning is that by denying the title of the landlords the defendant had forfeited the tenancy and consequently had ceased to be a tenant, with the result that the protecttion afforded by Madras Act XXV of 1955 will not be available to him. For this purpose, the learned District Judge has relied on the decision of Ramachandra Iyer, J., (as he then was) in *Sankaracharya Swamigal Mutt* v *Alagu Ambalam*[1] The

1. (1960) 2 M.L J 173 (1958) 71 L W 844

learned Judge in that case was dealing with the Madras Tenants and Ryots Protection Act (XXIV of 1949). The learned Judge himself points out at page 847

> "There is however, the definition of the word 'tenant' under the Act XXIV of 1949 and the popular meaning of the word would relate to a person whose tenancy is subsisting. In certain other enactments, *e g* , the Madras City Tenants Protection Act III of 1922, section 2 (4), the Madras Buildings Lease and Rent Control Act XXV of 1949, section 2 (4), and the Madras Cultivating Tenants Protection Act XXV of 1955, section 2-a (1), defines the word tenant as including a person who continues in possession after the termination of the tenancy."

Therefore, this decision of the learned Judge has no application to a cultivating tenant coming within the scope of Madras Act XXV of 1955.

Hence, I am of the opinion that since the Courts below came to the conclusion that the appellant was a cultivating tenant, under the circumstances of this case, they should have exercised their power under section 6-A of the Act and transferred the suits to the Revenue Divisional Officer. I am referring to the circumstances of this case for the reason that the lower appellate Court proceeded on the basis that the appellant by his act in issuing Exhibit A-2 had forfeited his tenancy and did not actually consider whether the appellant was entitled to some benefit or other under the Act. It is not the case of the respondents that the appellant was not entitled to any benefit under the Act Under these circumstances, I hold that the lower appellate Court ought to have transferred the suits under section 6-A of the Act for trial by the Revenue Divisional Officer. Since I am taking the view that it is for the Revenue Divisional Officer to decide whether the appellant had denied the title of his landlords or not, I am not expressing any opinion with regard to the second contention urged by Mr T. R Srinivasan, learned Counsel for the appellant; nor the finding of the Courts below on that point will be binding on the Revenue Divisional Officer Under these circumstances, these second appeals are allowed and the lower appellate Court is directed to transfer the suits under section 6-A of the Act to the Revenue Divisional Officer for disposal in accordance with law This judgment does not affect the decree for the arrears of rent passed by the Courts below. There will be no order as to costs in these second appeals.

No leave.

V.K. — *Appeals allowed; directions given.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR JUSTICE ISMAIL

Sri Booman *alias* Parakalam Pillai .. *Appellant**

v.

Kuppammal Achi and others ... *Respondents.*

Partition Act (IV of 1893), sections 4 (1) and 8—Scope of section 8—Order dismissing application under section 4 (1)—Not appealable under section 8—Can be challenged in proceedings against final deceree for partition—" Undivided family " in section 4 (1)—Meaning of—Scope and applicability of section 4 (1)

The language of section 8 of the Partition Act is express and categorical that an appeal is provided only against an order *for sale* made by the Court and not any order made by the Court under sections 2, 3 or 4 If it had been the intention of the Legislature to provide for an appeal against any order made under section 2, 3 or 4 the language of section would have been different. Thus, the *sine qua non* for invoking section 8 is an order for *sale.* Hence against an order dismissing an application made under section 4 (1) no appeal lies under section 8 and consequently the correctness of such an order can be canvassed in proceedings against the final decree for partition. Section 105 of the Civil Procedure Code, supports this view.

*A A O No 137 of 1965 4th January, 1968.

The expression "undivided family" in section 4 (1) of the Partition Act is not used in any technical sense as denoting only a joint Hindu family The term includes every family, whether Hindu or not. All that is required for the purpose of invoking the section is that the family must remain undivided with reference to the property which is the subject-matter of the suit.

Taking into account the fact that in a partition action every party is at the same time a plaintiff as well as a defendant, it cannot be said that for the purpose of the application of section 4 (1) the transferee himself must have as plaintiff instituted the suit Hence the contention that section 4 (1) will apply only when the transferee himself filed as suit for partition and that where the transferee figures only as a defendant in the suit for partition filed by other persons section 4 (1) has no application, is without substance

The right of a person to invoke the benefit of section 4 (1) cannot be defeated merely because the share purchased by the stranger-transferee can easily be severed and enjoyed as a separate share.

Query: Whether section 4 (1) can be applied to one half of a house which is the subject-matter of a partition suit?

Appeal against the order of the Court of the Subordinate Judge, Nagapattinam, dated 1st March, 1965 and made in A S. No. 9 of 1965 (I.A. No. 93 of 1962 in O.S. No. 309 of 1959, District Munsif's Court, Nagapattinam).

V. Ratnam for *R. Sundaralingam*, for Appellant.

V. S. Ramakrishnan, for Respondent

The Court delivered the following

JUDGMENT —Respondents 1 and 2 herein filed O S. No. 309 of 1959 on the file of the Court of the District Munsif of Nagapattinam for partition and separate possession of their 3/4 share in the suit property which itself is one half of a dwelling house. The third respondent to the present appeal was the first defendant in the suit and one Amirthalingam Pillai was the second defendant. After the death of the said Amirthalingam Pillai, during the pendency of the suit, his widow and children were brought on record as defendants 3 to 6. In that suit a preliminary decree for partition was passed on 14th December, 1960. On 9th March, 1961, one Booman *alias* Parakalam Pillai purchased the share of defendants 3 to 6 in the suit property On 13th June, 1962, on an application made by him the said Booman *alias* Parakalam Pillai was added as the seventh defendant to the suit The said order was challenged on appeal and the appeal was dismissed on 11th March, 1963. A civil revision petition filed to this Court failed on 26th July, 1963. On 31st October, 1963, respondents 1 and 2 herein, namely, the plaintiffs in the suit filed an application under section 4 (1) of the Partition Act, 1893. This application was dismissed on 29th November, 1963. Thereafter on the application of the seventh defendant a final decree was passed on 31st December, 1963. Against the said final decree A.S. No. 9 of 1965 was preferred to the Subordinate Judge of Nagapattinam who, by his judgment and order date 1st March, 1965, allowed the appeal and remitted the final decree proceedings back to the trial Court and directed the trial Court to proceed under section 4 (1) of the Partition Act and value the share of the seventh defendant in the suit property and sell it to the plaintiffs. As I pointed out already, the suit property itself was one half of the house and the plaintiffs are entitled to 3/4 thereof, namely, 3/8th of the entire house, the seventh defendant being entitled to 1/4 share of the suit property. It is admitted that the second defendant to the suit was the owner of the other half of the house and the seventh defendant had purchased that half also with the result the seventh defendant is entitled to 5/8th of the entire house. It is against the order of remand of the learned Subordinate Judge dated 1st March, 1965, that the present appeal has been filed.

Mr. Rathnam, the learned Counsel for the appellant contended (*i*) that the application filed by the plaintiffs under section 4 (1) of the Partition Act having been dismissed on 29th November, 1963, and they not having preferred any appeal against the same, the learned Subordinate Judge was in error in remanding the proceedings back to the trial Court with a direction to apply the provisions of section 4 (1) of the Act; and (*ii*) that to the present case section 4 (1) has no application, because (*a*) the purchase by the seventh defendant was subsequent to the preliminary decree dated 14th December, 1960, and therefore on that date there was no undivided family owning a dwelling house, and (*b*) section 4 (1) will apply only when that transferee filed a suit for partition and that when that transferee figures only as a defendant in the suit for partition filed by other persons, section 4 (1) has no application.

For the purpose of understanding the first contention of the learned Counsel, it is necessary to set forth one other fact. In the appeal filed before the learned Subordinate Judge the plaintiffs had taken a ground challenging the correctness of the order dated 29th November, 1963, of the learned District Munsif dismissing the application filed under section 4 (1) of the Act. They also filed a fresh application under section 4 (1) of the Act before the learned Subordinate Judge himself. the learned Subordinate Judge did not rest his conclusion solely on the basis of the fresh application under section 4 (1) of the Act filed before him, but also on the basis of his conclusion that the earlier dismissal of the application under section 4 (1) previously filed by the plaintiffs was erroneous It is against this background that the first contention of the learned Counsel for the appellants has to be considered. The learned Subordinate Judge, relying upon the decision of the Calcutta High Court in *Bhuban Mohan* v *Brojendra Chandra*[1], took the view that an appeal did not lie against the order dated 29th November, 1963, of the learned District Munsif dismissing the application of the plaintiffs made under section 4 (1) of the Act and therefore it was open to the plaintiffs to challenge the correctness of that order of dismissal in the appeal against the final decree proceeding. Consequently the point that has to be considered is whether an appeal lies against the order dismissing the application made under section 4 (1) of the Partition Act. The section of that Act which provides for an appeal is section 8 and it is in the following terms :—

> " Any order for sale made by the Court under sections 2, 3 or 4 shall be deemed to be a decree within the meaning of section 2 of the Code of Civil Procedure."

The language of the section is express and categorical that an appeal is provided only against an order for sale made by the Court and not any order made by the Court under sections 2, 3 or 4 When there is no order for sale made by the Court, clearly, by its very terms section 8 is not attracted and consequently no appeal will lie against an order dismissing the application made under section 4 (1) of the Act. The decision of the Calcutta High Court already referred to support this conclusion. If it had been the intention of the Legislature to provide for an appeal against any order made under sections 2,3 or 4 the language of the section would have been different. The section does not provide for an appeal against any order made by the Court under sections 2, 3 or 4 of the Act but only against *any order for sale* made under those provisions Consequently the *sine quo non* for invoking the provisions of section 8 is an order for sale and, when there is no order for sale, section 8 cannot have any application. This conclusion of mine is supported by a judgment of the Allahabad High Court in *Wali Mohammad* v *Shamshul Haq*[2] On the other hand, Mr Rathnam, the learned Counsel for the appellant, relied upon the decision of the Nagpur High Court in *Laxman* v. *Mt Lahana Bai*[3], The only relevant observation in that case is as follows :—

1. A I R. 1941 Cal 311.
2. (1967) A L J. 379.
3. A I R 1937 Nag. 4.

"The reason why it is said the appeal is not maintainable is that the order in question is not one to which Order 43, Civil Procedure Code applies. The answer, I think, is to be found in section 8, Partition Act."

And section 8 is quoted. It is clear from the judgment in that case that no argument was advanced to the Court that from the language of section 8 an appeal would lie only if an application under section 4 (1) was allowed and a sale was ordered and no such appeal would lie if the application under section 4 (1) of the Act was simply dismissed. On the other hand, the argument that was put forward before the Court in that case was that under Order 43, Civil Procedure Code, no appeal lay against the said order. Repelling that contention the Court pointed out that section 8 of the Partition Act itself provided for the appeal. In view of this position, I am unable to accept that the decision of the Nagpur High Court lays down any proposition such as that an order dismissing an application under section 4 (1) of the Partition Act is appealable under section 8 of the Act. Once I come to the conclusion that an order dismissing an application under section 4 (1) of the Act cannot be deemed to be a decree under section 8 of the Partition Act, the conclusion is irresistible that no appeal lay against such an order and the correctness of that order can be canvassed in proceedings against the final decree. Section 105 of the Civil Procedure Code, supports this conclusion of mine. Therefore, I overrule the first contention of the learned Counsel.

In my view the second contention also is without substance. The expression 'undivided family' in section 4 is not used in any technical sense as denoting only a joint Hindu family. The term includes every family, whether Hindu or not. All that is required for the purpose of invoking the section is that the family must remain undivided with reference to the property which is the subject-matter of the suit. In *Ramaswami Pillai* v. *Subramania Pillai*[1].

"....'undivided family' in the section has been held by a series of decisions to mean simply a family which has not divided the dwelling house by metes and bounds. A Hindu joint family divided in status will still be an undivided family *qua* dwelling house, if there has heen no division of the dwelling house by metes and bounds for the purposes of the Act."

The learned Judge in the same judgment has also pointed out:

"As I look at it, even though the stranger-transferee might not have himself instituted the suit for partition, if in a suit for partition, wherein he is made a party defendant, he asserts and applies for his share and seeks relief from Court in recognition of his rights, it could properly be stated that he sues for partition."

In this case, as I pointed out already, though the seventh defendant purchased the share of defendants 3 to 6 on 9th March, 1961, *i.e.*, subsequent to the preliminary decree for partition, he applied to be impleaded as a defendant to the suit and he was so impleaded by order dated 13th June, 1962, and that order became final. Taking into account the fact that in a partition action every party is at the same time a plaintiff as well as a defendant, it cannot be contended that, for the purpose of application of section 4 (1), the transferee himself must have figured as a plaintiff instituting the suit. Therefore, in my view, the second contention of the learned Counsel for the appellant also fails.

One other suggestion that was made was that it has not been found in this case that it was impossible for the convenience of the parties to effect a partition. As has been pointed out by this Court in *Sennammal* v. *Natarajan*[2], the right of a person to invoke the benefit of section 4 (1) of the Act cannot be defeated merely because the share purchased by the stranger-transferee can be easily severed and enjoyed as a separate share without disturbing the enjoyment of the remaining share by the other coparceners.

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1. I.L.R. (1967) 1 Mad. 602: (1966) 2 M.L.J. 132.

2. (1966) 2 M.L.J. 393.

Then there remains one consideration that has to be taken note of As pointed out already, the second defendant was the owner of the other half of the house and the seventh defendant had purchased that half also, but that half is not the subject-matter of the suit As far as the suit is concerned, the subject-matter was only one half of the house excluding the half of the house originally belonging to the second defendant and subsequently sold to the seventh defendant Consequently, the question that arise for consideration is whether section 4 (1) can be applied to one half of the house which is the subject-matter of the present suit In *Masitullah* v. *Umrao*[1], the second plaintiff, who had already purchased a share belonging to a member of the undivided family, filed a suit for partition and in that suit for partition the defendants did not invoke the benefit conferred by section 4 (1) of the Act. Consequently a partition was effected Subsequently plaintiffs 1 and 2 purchased the shares of two other members of the family and then filed a suit for partition. In that suit for partition the defendants filed an application under section 4 (1) of the Act. One of the points that came to be considered by the Court was that whether in view of the earlier partition decree, the integrity of the dwelling house was destroyed and consequently section 4 (1) could not be applied in respect of the other portion Such a contention was rejected by the Allahabad High Court and it was observed :

> "The argument is plausible but has no substance. The effect of the partition of 1922 was to cut off a portion of the house but to leave the rest of the house as a separate and independent entity The rest of the house was a compact whole held by a number of co-sharers who were members of an undivided family having a community of interest. The portion left undivided must be regarded as a separate unit."

The principle underlying this decision of the Allahabad High Court has been followed by the Calcutta High Court in *Balakrishna* v. *Akshey Kumar*[2], and by the Patna High Court in *Sheedhar Prasad* v *Kishun Prasad*[3]. As far as the present case is concerned, no objection seems to have been taken before the Courts below on behalf of the appellants contending that the suit portion of the house was not a separate unit so as to come within the scope of the expression 'dwelling house' in section 4 (1) of the Act On the other hand, in paragraph 2 of the plaint it is stated as follows :—

> "The 2nd defendant who is entitled to the rest of the entire house (specific part of the house) under the aforesaid partition . ...."

Consequently all the parties have proceeded on the basis that the subject-matter of the suit itself constituted a separate unit coming within the scope of the expression 'dwelling house' used in section 4 (1) of the Act.

In view of these considerations I am of the opinion that the order of the learned Subordinate Judge dated 1st March, 1965 is correct and does not call for any interference. Hence this appeal is dismissed with costs.

V.K. *Appeal dismissed.*

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1. A I R 129 All 414
2. (1950) 54 C W N 660.
3. A I R. 1941 Pat 4

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ISMAIL

T. K Santhanagopala Chettiar and others . *Appellants**

v

Thimmi M Seetharama Chettiar and others *Respondents*

Madras Hindu Religious and Charitable Endowments Act (XXII of 1959), Sections 63 (a) and 108—Suit in civil Court claiming relief on the basis that suit temple was outside the purview of the Act—Maintainability—Bar of section 108—Applicability

Civil Procedure Code (V of 1908), Section 80—Suit against Commissioner functioning under the Madras Hindu Religious and Charitable Endowments Act, 1959—Notice under section 80—Necessity

When the applicability of the provisions of the Madras Hindu Rel gious and Charitable Endowments Act, 1959, (hereinafter referred to as the Act), to a temple is challenged, the Deputy Commissioner has jurisdiction to decide that question under section 63 (a) of the Act Consequently, a suit filed in a civil Court claiming certain reliefs on the basis that the provisions of the Act do not apply to the suit temple and as such is outside the purview of the Act, would be barred by section 63 (a) read with section 108 of the Act

However, a civil suit for rendition of account against the trustees of a temple appointed by the members of a community, is not barred by any of the provisions of the Act

The decision of the Supreme Court in *Govinda Menon v Union of India*, A I.R. 1967 S C 1274, and section 12 of the Act make it clear that the Commissioner of the Madras Hindu Religious and Charitable Endowments while functioning under the provisions of the Act functions only as a public officer or Government servant and as such the provisions contained in section 80, Civil Procedure Code will apply to him

The argument that when the Commissioner is functioning in relation to matters under the Act he is a judicial officer and consequently no notice to him is necessary under section 80, Civil Procedure Code, is untenable Under section 110 of the Act when the Commissioner or the Deputy Commissioner makes an enquiry, he is deemed to be a person judicially acting, only for the purposes of the Judicial Officers Protection Act, 1850 and even this protection is available to the Commissioner or the Deputy Commissioner only when he is conducting an enquiry or hearing an appeal under Chapter V or Chapter VI of the Act

Appeal against the order of the Court of the Subordinate Judge of Kumbakonam, dated 26th July, 1965 and made in A S No 103 of 1964 (O S No 359 of 1963) District Munsif Court, Kumbakonam).

K S Desikan, for Appellants

N. R Govindachari, for Respondents and Additional Government Pleader.

The Court delivered the following

JUDGMENT —Respondents 1 and 2 herein instituted O S No 359 of 1963 on the file of the Court of the District Munsif, Kumbakonam, for "(a) declaring that Sri Rajagopalaswami Temple set out in Schedule 'A' and its properties set out in Schedules 'B' and 'C' exclusively belong to Pattusaluvar community residents of Solamalgai village and directing the defendants 1 to 3 to put the plaintiffs in possession of the same, (b) directing the defendants 1 and 2 to render a true and proper account of their management as trustees of the suit temple from the date of their appointment, *viz*, 14th April, 1959 till this date (date of plaint) and pay plaintiffs for the use of the said temple such amounts as may be found due by them on taking of account" The basis of this prayer was that the temple belonged to members

* A.A.O No 338 of 1965 29th January, 1968.

of Pattusaluvar community exclusively and they alone owned the temple and were worshipping the deities of the temple, it is a private temple which belonged to that community residents of the village and nobody else had any right of worship or in the properties acquired for the said temple, the Pattusaluvar community people are the hereditary adeenakarthars of the said temple and the members of the community nominated by them are the hereditary trustees of the suit temple. Defendants 1 and 2 (appellants 1 and 2) were appointed as trustees for the suit temple by the members of the Pattusaluvar community residents of the said village for a period of three years ending with 14th April, 1962; subsequently defendants 1 and 2 nurturing some grievance against other members of the community got themselves, along with the 3rd defendant, (3rd appellant) appointed as trustees of the temple by the Area Committee under the provisions of the Madras Hindu Religious and Charitable Endowments Act, 1959; the 3rd defendant does not belong to Pattusaluvar community, he is a Padayachi and he has no right to worship in the suit temple or in the administration of the affairs of the temple. On these allegations and on the basis of the contention that the provisions of the Hindu Religious and Charitable Endowments Act are not applicable to the said institution, the suit was instituted To the suit, in addition to the defendants 1, 2 and 3, a lessee in respect of certain properties was impleaded as the fourth defendant and the Area Committee was impleaded as the fifth defendant and the Commissioner, Madras Hindu Religious and Charitable Endowments, wasimplaaded as the sixth defendant.

In the written statement filed by the defendants, a plea was raised as to the maintainability of the suit. On the basis of the said plea, the learned District Munsif framed two questions for the purpose of preliminary determination, they being (1) whether the suit is entertainable in the civil Court in view of the provisions of the Madras Hindu Religious and Charitable Endowments Act? and (2) Whether the suit is bad for want of notice under section 80, Civil Procedure Code, to defendants 5 and 6? The learned District Munsif, by his judgment and decree dated 17th September, 1964 found in favour of the appellants on both these points. He came to the conclusion that whether the suit temple was a religious institution coming within the scope of the Act or not was a matter left to the exclusive jurisdiction of the Deputy Commissioner under section 63 (*a*) read with section 108 of the Act and the absence of notice under section 80 of the Civil Procedure Code to defendants 5 and 6 rendered the suit not maintainable.

Against this judgment of the learned District Munsif, the plaintiffs preferred A.S. No. 103 of 1964 on the file of the Court of Subordinate Judge, Kumbakonam. The learned Subordinate Judge by his judgment and order dated 26th July, 1965, set aside the judgment and decree of the learned District Munsif and remanded the suit for fresh disposal according to law and in the light of his observations in the judgment. With regard to the first question, the learned Subordinate Judge, relying upon a Bench decision of this Court reported in *Dr Ananda Baliga* v. *Ananteswar Temple*[1], came to the conclusion that the suit was maintainable in the civil Court. With regard to the second point, though the learned Subordinate Judge expressed his opinion that a notice under section 80, Civil Procedure Code, was not necessary to defendants 5 and 6, since the sixth defendant was a Corporation sole and the Hindu Religious and Charitable Endowments Act was a self-contained enactment laying procedure for all contingencies and that Act does not contain any provisions stipulating the issue of a notice as a condition precedent, still he stated that he refrained from giving a finding on this point in view of the order of remand he was passing.

It is against this order of remand, the defendants 1 to 3 in the suit have preferred the present Civil Miscellaneous Appeal

Mr. K. S. Desikan, the learned Counsel for the appellants contended that the finding of the learned Subordinate Judge on the first point is erroneous, in view of

1. (1952) 1 M.L.J. 678

the decision of the Supreme Court reported in *State of Madras* v *Kunnakudi Melamatam*[1] the decision of the Madras High Court in *Dr. Ananda Baliga* v. *Ananteswar Temple*[2], is no longer good law, in view of the said decision of the Supreme Court. The learned Counsel further contended that even with regard to the second point the decision of the Supreme Court reported in *Govinda Menon* v *Union of India*[3], clinches the issue in favour of the conclusion that the Commissioner under the Hindu Religious and Charitable Endowments Act is a Government servant and therefore a notice under section 80 is necessary.

In order to appreciate the contentions advanced, it is necessary to refer to certain statutory provisions. Section 6, clause 18 of the Hindu Religious and Charitable Endowments Act, 1959 definess a "religious institution" as a math, temple or spicific endowment. Clause 20 of the section defines 'temple' thus :

> " a place, by whatever designation known, used as a place of public religious worship, and dedicated to, or for the benet of, or used as of right by, the Hindu community or any section thereof, as a place of public religious worhsip "

Section 63 so far as is relevant for the purpose of this case provides as follows :

> " Subject to the rights of suit or appeal hereinafter provided, the Deputy Commissioner shall have power to inquire into and dedcide the following disputes and matters :—
>
> (*a*) whether an institution is a religious institution ;"

Section 69 of the Act provides for an appeal against the order of the Deputy Commissioner to the Commissioner. Section 70 enables an aggrieved partyt to file a suit agaist the orders of the Commissioner under certain provisions, one of them being an order of the Commissioner passed in an appeal against the order of the Deputy Commissioner under section 63 of the Act.

Section 108 of the Act states that no suit or other legal proceeding in respect of the administration or management of a religious institution or any other matter or dispute for determining or deciding which provision is made in this Act shall be instituted in any Court of law, except under, and in conformity with, the provisions of this Act.

Along with these provisions, reference may be made to a few other provisions under which defendants 1 to 3 have been appointed as trustees of the temple by the Area Committee Under section 47 the Commissioner has got the power to constitute a Board of Trustees in respect of certain religious institutions The same power is available to the Area Committee under section 49 of the Act in respect of certain other religious institutions; and in this case the Area Committee exercised its power of appointing defendants 1 to 3 as trustees only under section 49 One other fact that has to be noticed is, that in the present case, against the order appointing defendants 1 to 3 as trustees, the respondents herein preferred a revision petition to the Commissioner (sixth defendant) under section 21 of the Act and the sixth defendant declined to interfere with the order of the Area Committee.

It is against the background of these statutory provisions, the maintainability of the suit for the relief claimed by the respondents 1 and 2 herein has to be considered. As I have pointed out already, one of the contentions of the respondents 1 and 2 in the plaint is that the provisions of the Hindu Religious and Charitable Endowments Act do not apply to the suit temple. If that be the case, there is a specific provision made in section 63 (*a*) of the Act for determining that question. Only in relation to this, the learned Subordinate Judge relied on the decision of this Court in *Dr Ananda Baliga* v *Ananteswar Temple*[2], (already referred to) and came to the conclusion that the suit is not barred. In that case which dealt with the provisions contained in Madras Hindu Religious and Charitable Endowments Act (II of 1927),

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1 (1966) 2 S C J 175 (1966) 2 M L J (S C) 13 (1966) 2 An W R (S C) 13 A.I R. 1965 S C. 1570.

2 (1952) 1 M L J 678

3 A I.R. 1967 S C. 1274.

a Bench of this Court had to consider the scope of section 84 and the related provisions Section 84 of that Act had provided as follows :—

"If any dispute arises as to—

(a) Whether an institution is a math or temple as defined in this Act,

(b) Whether a trustee is a hereditary trustee as defined in this Act, or not, or

(c) Whether any property or money endowed is a specific endowment as defined in this Act or not,

such dispute shall be decided by the Board and no Court in the exercise of its is original jurisdiction shall take cognizance of any such dispute"

In that Act also section 9, clause (12) had defined a 'temple' as follows .— "'Temple' means a place, by whatever designation known, used as a place of public religious worship and dedicated to, or for the benfit of, or used as of right by, the Hindu community or any section thereof, as a place of religious worship."

With reference to these provisions, the learned Judges have, in that case, stated :—

"The argument is, if a question arises whether a temple is owned by the Hindu community as a whole or whether it is owned only by a section of that community the dispute would then be one which can aptly be described as raising the question whether the institution is a temple or not within the meaning of section 84 (1) of the Act In our opinion, if the section is so construed, it would be placing a strained construction upon it and we think that the language of the section does not warrant such an interpretation The section is intended to give jurisdiction to the Board to decide a dispute, when a dispute is raised, whether a particular institution is a math or temple as defined by the Act; and not a dispute which admits the institution to be a temple but that the temple is exclusively owned by a particular religious denomination such as the Gowd Saraswat Brahmin community and not by the Hindu community as a whole. Section 84 (1) (a) of the Act, therefore, in our opinion, does not cover the dispute raised in the present suit, and therefore, the prohibition against the exercise of the jurisdiction by the Civil Court under section 84 (1) does not come into operation"

Thus it will be seen that this decision of this Court supports the stand taken by the respondents herein that when they are challenging the applicability of the Act itself to the temple in question it cannot be said that the Deputy Commissioner under section 63 (a) of the Act has jurisdiction to decide that question and consequently the suit at the instance of respondents 1 and 2 is barred. However the contention on the part of the appellants is that the decision above referred to is no longer good law in view of the decision of the Supreme Court in *State of Madras* v *Kunnakudi Melamatam*[1], (already referred to). In that case a suit was instituted praying for an order of injunction restraining the Madras Hindu Religious Endowments Board from levying any contribution under sections 69 and 70 of Madras Act II of 1927 on the allegation that the institution was outside the purview of the Act and the levy was otherwise illegal During the pendency of the suit, the Madras Hindu Religious and Charitable Endowments Act 1951 (XIX of 1951) came into force and in view of the provisions contained in section 103 (j) of the said Act, the suit was continued against the Commissioner of the Hindu Religious Endowments The prayrer portion of the plaint was also amended by inserting a claim of injunct on restraining the third defendant from levying any contribution under Act XIX of 1951 The Supreme Court had to consider the two reliefs claimed by the respondent in that case, namely, (1) an injunction restraining the levy of contributions and audit fees under Act III of 1927 and (2) an injunction restraining the levy of contributions and audit fees under Act XIX of 1951 With regardt of the claim for the first injunction the Supreme Court upheld the contention of the respondent on the gruond that the Hindu Relig ous Endowments Board had decided that the respondent institution

1 (1966) 2 S C J 175 (1966) 2 M L J (S C) S C 1570
13 (1966) 2 An W R (S.C) 13 A I R 1965

was outside the purview of Act II of 1927 and that the decision was binding for the purpose of that Act on both the parties. With regard to the second injunction the Supreme Court referred to the definition of a ' Math ' contained in section 6 (10) of the Act of 1951 and also the provisions contained in sections 57 and 93 of that Act corresponding to sections 63 and 108 of the present Act and observed :

> " Now, one of the disputes in this suit is whether the institution is a religious institution within the meaning of Act XIX of 1951. Specific provision is made in sections 57, 61 and 62 of the Act for determination of that dispute by the Deputy Commissioner, the Commissioner and eventually by a suit instituted in a Court under section 62 The present suit is not brought under or in conformity with section 62 and consequently, in so far as the suit claims the relief of injunction restraining the levy of contribution and audit fees under Act XIX of 1951, it is barred by section 93 of the Act "

I may point out that section 61 of the Act 1951 corresponds to section 69 of the present Act providing for an appeal to the Commissioner and section 62 of the Act of 1951 corresponds to section 70 of the present Act providing for a right of suit In my opinion, this decision of the Supreme Court concludes the question in favour of the appellants for two reasons (1) As I already pointed out, the provisions of the Act of 1951 construed by the Supreme Court are the same as the relevant provisions in the present Act, and (2) In the case before the Supreme Court also the basis of the claim made was that the institution was outside the purview of the Act Consequently this decision of the Supreme Court is decisive on the point in controversy in favour of the appellants

Mr Govindachari, the learned Counsel for the respondents contended that it is not the case of the respondents 1 and 2 that the Madras Hindu Religious and Charitable Endowments Act has no application at all to the suit temple and his case was that the temple is one owned by a religious denomination coming within the scope of Article 26 of the Constitution and the main object of the suit was to obtain a declaration that the suit temple is a denominational temple entitled to the protection conferred by Article 26 of the Contitution I am unable to agree with the contention of Mr. Govindachari that the suit in the present case claims only such limited reliefs. I have already referred to the averments contained in the plaint for the purpose of showing that the claim of respondents 1 and 2 is that the suit temple is outside the purview of the Act. It is only on that basis they sought delivery of possession of the temple and its properties from defendants 1 to 3 thereby challenging the order of the Area Committee appointing defendants 1 to 3 as trustees My decision in this case holding that the present suit is barred by the provisions contained in the Madras Hindu Religious and Charitable Endowments Act is based solely on the ground that the respondents 1 and 2 had claimed the relief on the basis of the contention that the suit-temple is outside the purview of the Act. Whether the respondents will be entitled to file a suit in a civil Court for a declaration that the suit-temple is a denominational temple entitled to the protection conferred by Article 26 of the Constitution of India and that the provisions contained in the Madras Hindu Religious and Charitable Endowments Act, 1959 can be applied only subject to the constitutional right is recognised by section 107 of the Act itself and that in any particular matter the authorities under the Act have not kept within their limits with reference to the rights of the denomination under Article 26 of the Constitution, does not arise for my consideration in the present suit and therefore my decision in this case will not affect any such question

With regard to the second question, as I pointed out already, the learned Subordinate Judge took the view that the Madras Hindu Religious and Charitable Endowments Act is a self-contained enactment and that enactment does not contain any provision stipulating for a notice to defendants 5 and 6 and also the Commissioner being a Corporation sole, no notice under section 80, Civil Procedure Code, is necessary Section 11 of the Madras Act XXII of 1959 states that the Commissioner shall be a Corporation sole and shall have perpetual succession and a common

seal and may sue and be sued in his corporate name. Section 12 provides that the Commissioner, Deputy Commissioners, Assistant Commissioners and other officers and servants including executive officers of religious institutions employed for the purpose of this Act shall be servants of the Government..... ..." It is not denied before me that if the Commissioner is a Government servant section 80 of the Civil Procedure Code, will apply. However the argument of Mr Govindachari is that when the Commissioner is functioning in relation to matters as the one in question he is a judicial officer and consequently no notice to him is necessary. For this purpose, learned Counsel relied upon the provisions contained in section 110 of the Act which are sa follows:—

> "Section 110 (1):—Where a Commissioner or a Deputy Commissioner makes an inquiry or hears an appeal under Chapter V or Chapter VI, the inquiry shall be made and the appeal shall be heard, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (Central Act V of 1908) to the trial of suits or the hearing of appeals, as the case may be;
>
> (2) The provisions of the Indian Evidence Act, (Central Act I of 1872), and the Indian Oaths Act, (Central Act X of 1873), shall apply to such inquiries and appeals; and
>
> (3) The Commissioner or a Deputy Commissioner holding such an inquiry or hearing such an appeal shall be deemed to be a person acting judicially within the meaning of the Judicial Officers Protection Act, (Central Act XVIII of 1850)".

There are two answers to this submission of Mr. Govindachari. The first is that under section 110, when a Commissioner or a Deputy Commissioner makes an inquiry, he is deemed to be a person judicially acting, only for the purpose of the Judicial Officers Protection Act, 1850. The second is that even this protection is available to the Commissioner or a Deputy Commissioner only when he is conducting an inquiry or hearing an appeal under Chapter V or Chapter VI. As I pointed, out already, the Area Committee exercised its powers, in appointing defendants 1 to 3 as trustees, under section 49 which falls under Chapter III of the Act; and the Commissioner exercised his power of revision under section 21 which falls under Chapter II of the Act. Consequently I am unable to accept this contention of Mr Govindachari.

In relation to the Commissioner being a corporation sole, that question came up for consideration before the Supreme Court in *Govinda Menon* v. *Union of India*[1]. That case related to certain disciplinary proceedings taken by the Government against the appellant while functioning as Commissioner under the Hindu Religious and Charitable Endowments Act. A contention put forward in that case was that the Commissioner being a corporation sole, he was not a Government servant liable to the disciplinary proceedings of the Government. In dealing with that contention, the Supreme Court pointed out:

> "It is true that the Commissioner has been made a corporation sole under section 80 of the Act which states that the Commissioner shall have perpetual succession and common seal and may sue and be sued in his corporate name. Section 81 (1) of the Act provides for the establishment of a Fund called "The Madras Hindu Religious and Charitable Endowments Administration Fund" and further states that the Fund shall vest in the Commissioner It was argued for the appellant that the corporate entity created by section 80 of the Act has a separate legal personality. But there is a juristic distinction between a corporation sole and a corporation aggregate and the corporation sole is not endowed with a separate legal personality as the corporation aggregte.
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> As Maitland said
>
> 'If our corporation sole really were an artificial person created by the policy of man we ought to marvel at its incompetence. Unless custom or statute aids it, i

1. A.I R 1967 S C. 1274

cannot (so we are told) own a chattel, not even a chattel real A different and an equally inelegant device was adopted to provide an owning "subject" for the ornaments of the church and the minister thereof adopted at the end of the Middle Ages by lawyers who held themselves debarred by the theory of corporations from frankly saying that the body of parishioners is a corporation aggregate. And then we are also told that in all probability a corporation sole 'cannot enter into a contract except with statutory authority or as incidental to an interest in land. ...... Be that as it may, the ecclesiastical corporation sole is no 'juristic person'; he or it is either natural man or juristic abortion' (See Selected Essays of Maitland pages 100 and 103)'

Keeton has also observed as follows:—

"It was a device for transmitting real property to a succession of persons without the necessity for periodic conveyances. It was never intended that this device should be erected into a psychological person with a developed existence of its own ....In dealing with a corporation sole, the Courts have never treated it as a conception similar in essential characteristics to a corporation aggregate. They have restricted its utility to the transmission of real, or exceptionally, by custom, as in *Byrd* v. *Wilford*,[1], and now by statute, personal property from one holder of an office, lay or ecclesiastical, to his successor' (See 'Elementary Principles of Jurisprudence' by Keeton, 2nd Edn. pages 155 and 162). We accordingly reject the contention of the appellant that the Commissioner has a separate legal personality as corporation sole under section 80 of the Act and that he is exempt from disciplinary proceedings for any act or omission committed in his capacity as Commissioner In our opinion, the object of the Legislature in enacting sections 80 and 81 of the Act was to constitute a separate Fund and to provide for the vesting of that Fund in the Commissioner as a corporation sole and thereby avoid the necessity of periodic conveyance in the transmission of title to that Fund".

Thus this decision and the provisions contained in section 12 of the Act already referred to make it absolutely clear that the Commissioner while functioning under the provisions of the Act functions only as public officer or Government servant and as such the provisions contained in section 80, Civil Procedure Code, will apply to him. I may point out that section 80 of the Act of 1951 considered in the above decision corresponds to section 11 of the Act of 1959, referred to already.

Therefore, in view of my conclusion on these two points, the reult is, that in so far as the respondents 1 and 2 herein prayed for a declaration that the suit-temple falls outside the provisions contained in the Madras Hindu Religious and Charitable Endowments Act, 1959, and the Area Committee had no jurisdiction to appoint the trustees, on the ground that the temple belongs to a denomination, the suit is not maintainable in a civil Court. As I pointed out already, the suit also contains a prayer for rendition of accounts against defendants 1 and 2 only from the date of their appointment, namely, 14th April, 1959 as trustees. The basis of this relief is that defendants 1 and 2 were on that date appointed as trustees by the community and therefore they are answerable to the community. Such a relief cannot be said to come within the scope of the provisions contained in the Hindu Religious and Charitable Endowments Act, 1959 and therefore the action cannot be said to have been barred by any of the provisions contained in that Act. Consequently the learned District Munsif will have to consider the suit in relation to that prayer.

Under these circumstances I allow this appeal and set aside the judgment and order of the learned Subordinate Judge and remand the suit to the learned District Munsif for the purpose of proceeding with the suit further in relation to the prayer for rendition of accounts as mentioned by me. Since the suit for declaration based on the ground that the temple is outside the purview of the Madras Hindu Religious and Charitable Endowments Act, 1959 and for recovery of possession from

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1. (1596-78 E R 717)

defendants 1 to 3 on the same ground, is not maintainable in civil Court and since no notice under section 80, Civil Procedure Code, has been given to the sixth defendant, the suit as against the fifth and sixth defendants will stand dismissed No order as to costs in this appeal.

Leave to appeal granted.

V.K. — *Appeal allowed.*

IN THE HIGH CURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE P RAMAMURTI, J

T A Narasimhan . *Petitioner**

v

Narayana Chettiar and another . *Respondents*

Evidence Act (I of 1872), section 45—Opinion of handwriting expert—Defendant in civil suit applying for examinaiton of documents by a named expert—Court cannot compel him to accept an expert of plaintiff's choice—Sending of original documents in the custody of Court to handwriting experts depercated—Proper procedvre indicated

When the defendant in a civil suit applies to the Court for obtaining the opinion of a named handwriting expert to prove the genuineness of certain disputed documents to support his case, the Court cannot compel him to choose or accept a handwriting expert of the choice of the plaintiff for this purpose The handwriting expert is after all a witness of a particular party and a party cannot be compelled to choose a witness according to the dictation of the oppoisite party

The practice of sending original documents in the custody of Court to handwriting experts is a highly objectional and a very bad procedure Under no circumstances should a Court permit or allow the documents to go out of its custody, as such an evil practice is attendent with various risks. The proper procedure in such cases would be only to permit the handwriting expert to inspect the document in the Court premises itself in the presence of some responsible officer of the Court and also if necessary permit the expert to have photographic copies of documents in the presence of the responsible officer of the Court Any lapse in taking the necessary safeguards in this direction may result in miscarriage of justice, besides creating complications

The Court also deprecated the practice of making belated and repeated applications for examination of documents by handwriting experts, in order to protract and delay the trial

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Subordinate Judge of Salem, dated 25th August, 1964 and made in Interlocutory Application No 850 of 1964, in Original Suit No 167 of 1962.

S. Balathandapani for Petitioner

K N Balasubramaniam for *R Gopalaswami Ayyangar* for Respondent

The Court made the following

ORDER —This revision petition arises out of an application filed by the defendant for sending two documents to the handwriting expert Mr Dixit of Nagpur or Mr Mahajan of Bangalore for ascertaining their opinion about the genuineness of the disputed signatures

The plaintiff-respondent has filed a suit to recover a sum of Rs 10,000 and odd due on a mortgage executed by the defendant in favour of the plaintffs' deceased father The defendant is resisting the suit on the ground that the entire mortgage debt had been discharged and in support of that plea he has relied upon two documents : (1) A receipt, dated 30th March, 1954, alleged to have been passed in his

* C R P No 1992 of 1964 18th February, 1965.

favour acknowledging the payment of Rs 10,000 and odd ; and (ii) the letter, dated 9th December, 1955, written to him evidencing this plea of discharge.

As the genuineness of the signatures in the documents was disputed the defendant at an earlier stage filed Interlocutory Application No 248 of 1964, for obtaining the opinion of the handwriting expert The Court then sent the two documents to one Bhanagay of Nagpur, who has sent his report, which it is represented, is against the defendant At that time one affidavit containing the admitted signature of the plaintiff's father was sent for comparison and the expert had reported that the disputed signatures did not tally with or resemble the admitted signature

The defendant has now come forward with a second application, Interlocutory Application No 850 of 1964, for seeking the opinion of another expert by comparison of the disputed signatures with the admitted signature in some other affidavit. This time the defendant wants the report to be obtained either from Dixit or Mahajan. Since Mr. Bhanagay had already examined the documents it was suggested to the Court (on behalf of the plaintiff) that this time also the documents can be sent to the same expert, Bhanagay, and the trial Court readily acceded to this suggestion The defendant has preferred this revision against the said order.

Learned Counsel for the petitioner contends that when his client wanted the documents to be examined by a named expert neither the plaintiff nor the Court could compel his client to choose or accept a handwriting expert of the choice of the plaintiff In other words, the substance of the contention is that the plaintiff has no right to compel the defendant to choose as witness on his side, a person of the plaintiff's choice

The Court below was clearly in error in acceding to this extraordinary request of the plaintiff When the document is sent to the expert it is expected that he will submit the report and he will also be examined either on commission or in open Court at the instance of the party concerned It must not be overlooked that the handwriting expert is after all a witness of a particular party, and the expert could occupy no other role except that of a witness on the side of the defendant in this case In these circumstances it is impossible to justify the order of the lower Court compelling the defendant to choose a witness according to the dictation of the plaintiff

It frequently happens that such applications for examination of the documents by handwriting experts are made at a late stage protracting and holding up the proceedings. In the instant case the Court below failed to appreciate that an old suit of 1962, is being protracted by such applications When the disputed documents were sent to the handwriting expert for comparison on the earlier occasion one would expect the defendant to send as many admitted signatures as he may desire, so that the examination and scrutiny of the documents would be finished once and for all Encouraging such repeated applications would only protract and delay the trial of the suit and should be discountenanced When the matter goes back to the Subordinate Judge he must consider whether in his discretion this indulgence should be given to the defendant at this belated stage

Repeated instances have come to the notice of this Court when applications are lightly made for sending original documents on which suits are filed, like promissory notes and mortgage bonds, to the handwriting experts, the Court itself losing the custody of the documents. Receipts containing signatures, the genuineness of which are in dispute are similarly sent to handwriting experts I am clearly of the opinion that this is a highly objectionable and a very bad procedure Under no circumstances should a Court permit or allow the documents to go out of its custody, as such an evil practice is attendant with various risks which are too obvious to be mentioned In the case of enquiries by Commissioners or proceedings by Receivers, who are officers of Court, they are permitted to have access to documents, as they are under the direct control, supervision and jurisdiction of the Courts which appoint them, and there is thus ample safeguard when original documents are taken

by the Commissioners or the Receivers. In my view the proper procedure in such cases would be only to permit the handwriting expert to inspect the document in the Court premises in the presence of some responsible officer of the Court, and also if necessary permit the expert to have photographic copies of documents in the presence of the responsible officer of the Court Any lapse in taking the necessary safeguards in this direction may result in miscarriage of justice, besides creating complications.

Subject to these observations the Revision Petition is allowed. Interlocutory Application No. 850 of 1964, is remanded for fresh disposal. There shall be no order as to costs.

V.K. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Original Special Jurisdiction.)

PRESENT :—MR. JUSTICE K. SRINIVASAN.

Messrs. Raval and Company .. *Petitioners**

v.

K. G. Ramachandran (minor) and others .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *(as amended by Madras Act II of* 1962 *but before the passing of Madras Act(XI of* 1964)), *section* 30—*Scope and applicability—Exemption under, of non-residential buildings the monthly rental of which exceeds Rs.* 400—*Determination of rental value—Taxes agreed to be paid by tenant—If forms part of rent—Agreement of lease in respect of single building—Municipality giving two door numbers to it subsequently—Rent paid if can be taken to be for two buildings.*

Where by a contract the tenant agrees to pay the municipal taxes pertaining to the demised premises, the amount of such taxes is necessarily part of the rent, for the payment of the taxes is also in consideration of the right of the enjoyment of the premises.

Case-law discussed.

Consequently, where by an agreement of lease the tenant of a non-residential building agrees to contribute a certain sum annually towards repairs and municipal taxes in addition to a stipulated amount as rent and the total of these amounts works out to a monthly payment of over Rs. 400, the Madras Act XVIII of 1960 will not apply to the demised premises by reason of the exemption contained in section 30 of the Act as amended by Madras Act II of 1962.

Where a tenancy when it started, was undoubtedly in respect of a single premises only, the fact that the municipality for its own purposes have given more than one door numbers to the same, cannot make the contract of letting a letting in respect of more than one buildings, for the purpose of applying section 30 of the Act as amended in 1962.

Where an application for the fixation of fair rent for a building was not maintainable, on the date it was made, by reason of section 30, the fact that later on Madras Act (XI of 1964) was passed removing the exemption contained in section 30 would not make the application maintainable.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of prohibition prohibiting the respondents from prosecuting or proceeding with H R C Petition No 2942 of 1963 pending on the file of the Chief Rent Controller, Madras, the fourth respondent herein

V. K. Thiruvenkatachari for *K. C. Jacob, S. K. L. Ratan* and *R. Srinivasan,* for Petitioner.

* W.P. No 1124 of 1963. 30th April, 1966.

Advocate-General (*N Krishnaswami Reddi*) for Additional Government Pleader (*V. Ramaswami*), *V. Thiagarajan*, *M. A Rajagopalan* and *C P. Venugopal*, for Respondents.

The Court delivered the following

JUDGMENT.—When Madras Act (XVIII of 1960) was passed, section 30 was enacted therein exempting from the operation of the Act any non-residential building, the rental value of which on the date of the commencement of that Act as entered in the tax assessment book of the municipal council or other local body exceeded Rs. 400 per mensem. This provision was amended by Madras Act (II of 1962) substituting in the place of the rental value entered in the tax assessment book, the monthly rent paid by the tenant. This exemption was removed later by Act (XI of 1964) In between the dates of the passing of the two latter Acts, the landlords of certain premises, the respondents in this petition, filed an application before the House Rent Controller—H R.C. No. 2942 of 1963—for the fixation of fair rent. The tenant came to this Court contending that since the tenancy was under a contractual arrangement by means of a registered lease deed for a term of years, the House Rent Control Act could not apply to this tenancy. Apart from this general contention, it was also claimed that the monthly rental payable by the tenant was in excess of Rs. 400, so that by reason of section 30 of the Act as amended by Act (II of 1962), the Act could not apply to such a tenancy. On the first of these questions whether the Rent Control Act could govern contractual as well as statutory tenancies, the matter was referred to a Full Bench, and the Full Bench delivered its opinion that the Madras Act constituted a self-contained code, and notwithstanding the existence of a contractual tenancy for a term, the provisions of the Act would apply. [Vide *Raval & Co.* v. *Ramachandran*[1]]. Thus, only the second of the questions referred to above calls for examination in this writ petition.

The contention on behalf of the petitioner is that on the date of the application made by the respondent-landlords, tenancies in respect of which the tenant was paying a monthly rent in excess of Rs. 400 stood outside the scope of the Act, for section 30 laid down that *nothing contained in the Act shall apply* to such tenancies It is claimed accordingly that on the undeniable facts presently to be set out the rent of the premises is in excess of that figure, and the petition which was filed during the period when this exemption was operative was not maintainable. It is upon this question whether the rent of the premises is n excess of the sum of Rs. 400 that the present controversy has arisen.

Certain facts require to be stated. Under a demise of lease of the year 1935, the then owner of the property leased out the premises described as No. 2, Poonamallee High Road, Madras, to the petitioner, the tenant, for a period ending with 30th April, 1969. Clause (3) fixed the rent at Rs. 225 per mensem. The lessees were permitted to erect structures, and to make additions or alterations after notice to the lessor. The lessees could on the termination of the lease remove the new erections put up by them, unless by agreement between the parties the lessor elected to pay compensation for such additions and alterations : clause (10) provided that the lessor shall execute all repairs necessary to the buildings standing on the premises when the lease comes into force, and towards the cost of such repairs, the lessees were to contribute an annual sum of Rs. 225. Under clause (11) the lessor undertook to pay all the charges and taxes of a public nature and the lessees were to contribute an annual sum of Rs. 220 towards such charges and taxes. There was a clause enabling the continuance of the lease for a further terms of fifteen years. According to the petitioner, the tenant, during the currency of this lease, it has spent considerable amounts and made extensive additions, improvements and alterations to the property In 1946, the then owner claimed a 50 per cent increase in the rental on the ground that the Rent Control Act applied to the lease After some correspondence, in which the tenant disputed its liability, a settlement is said to have been reached, whereunder without prejudice to the rights of the tenant, the tenant agreed

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1. I L R. (1966) 2 Mad. 437 . (1966) 2 M L J, 68 (F. B).

to pay an increased rent Statements of accounts were exchanged between the parties, and according to the tenant, the tenant agreed to pay 25 per cent. more as increase in rent and also to bear the extra municipal taxes as and from the 1st October, 1946 The position as it stood on the 1st of June, 1954 was that, in addition to the payments stipulated in the lease deed, the tenant paid extra municipal tax of Rs 1,212 per year and a 25 per cent. increase in the original stipulated rent, which came to Rs 675, the total sum paid during the year being Rs. 5,032 working out to a monthly payment of slightly over Rs 419 It is the contention of the tenant that the entirety of this sum represents the rent paid by the tenant and it being in excess of Rs 400, the Act did not apply as on the date on which the application for fixation of fair rent was made

The respondents are the purchasers of the interest of the original landlord. It appears that the property which was described as No 2, Poonamallee High Road has subsequently been given two municipal door numbers, Nos 16 and 17. The rent for the premises is only Rs. 225 per month for both of these numbers It is admitted that the tenant has been paying a 25 per cent increase in the rent It is also admitted that two other payments stipulated in the lease deed towards annual repair charges and contribution towards municipal charges were being paid The respondents, however, claim that these amounts were being received by them without prejudice, whatever that expression may mean It is not, however, denied at this stage that the tenant entered into possession of the property under a registered lease deed from the previous owner It is, however, denied that except for the 25 per cent increase over the monthly rent of Rs 225 stipulated in the lease deed, the other payments are rent in any sense and cannot be taken into account for the purpose of determining whether the rent of the premises is in excess of Rs 400 In paragraph 10 of the counter-affidavit it is denied that the average monthly rent is Rs. 419 odd as alleged in paragraph 7 of the affidavit accompanying the petition, and it is asserted that the monthly rent is only Rs 225 plus the extra rent of 25 per cent. It may, however, be stated that the landlord-respondents do not deny that a total amount of Rs 5,032 as set out in paragraph 6 of the affidavit accompanying the petition is being received by them In this affidavit there is the clear averment that the present owners, respondents 1 to 3, are being paid rent on the basis mentioned The position is accordingly that while the respondents do not deny the receiving a sum of Rs 5,032 per year, they claim that only Rs 2,700 plus Rs 675 represent in reality the rent and the balance of the payment is not rent

The balance of the payment referred to is the extra municipal tax The question accordingly is this when the tenant and the landlord agree that the tenant shall make a contribution towards the extra municipal tax does such payment become merged with the rent within the meaning of the Rent Control Act

In one of the letters proceeding from the landlord, dated 16th April, 1949, the landlord in acknowledging the receipt of rent and other payments stipulated in the lease deed for the period 1st January, 1949 to 31st December, 1949 stated thus :

"I am afraid you have overlooked the increased property tax levied from 1947-48 first half to 1948-49 second half as follows .—

			Rs.	A	P.
First half year 1947-48	Excess paid on your behalf		525	5	1
Second half year 1947-48	Do	.	525	5	1
First half year 1948-49	Do	.	525	5	1
Second half year 1948-49	Do	..	525	5	1
			2,101	4	4

I have already paid the above amounts on your account as and when claimed I shall therefore be glad if you will send me your cheque for this amount to keep your account straight "

The tenant paid this amount *without prejudice to the rights of the parties* as appears in a letter, dated 19th August, 1949 Thereafter followed correspondence seeking an increase of rent, which ended in the landlord accepting a 25 per cent increase In a letter, dated 28th June, 1954, the then owner wrote to the petitioner bringing to the petitioner's attention that the tax on the property had been raised and an amount of extra tax was payable by the petitioner

After the present respondents purchased the property, the tenant-petitioner wrote a letter to the respondents bringing to the notice of the respondents the payments that had been made earlier and sending a cheque for the amount due for the subsequent period since the last payment It would suffice to rest with this statement of facts for the present in considering whether the excess payments made by the tenant constitute rent or not

Mr V. K Thiruvenkatachari for the petitioner contends that under section 105 of the Transfer of Property Act, the expressions *lease* and *rent* are defined. According to the section, a *lease* of immovable property is a transfer of a right to enjoy such property,

" in consideration of a price paid or promised, or of money, a share of crops, service, or any other thing of value, to be rendered periodically or on specified occasions, to the transferor by the transferee, who accepts the transfer on such terms "

The money, share of crops, service or any other thing to be so rendered is called the rent The Madras Buildings (Lease and Rent Control) Act does not define *rent* and it is the contention of the learned Counsel that any periodical payment of whatever kind made *as consideration for the right of enjoyment of the property under the lease* must be recognised as rent under the law It is well settled that in the Transfer of Property Act, the term *rent* has been used in a very wide sense The expression *rent* is obviously the remuneration or recompense which the landlord asks for and obtains from the tenant There seems no reason why a payment which the lessor calls upon the lessee to make and the lessee agrees to make as consideration for the privilege of enjoyment of the property on whatever account that sum might be demanded, should not be regarded as rent So long as the payment is connected with the right of occupation of the premises, the nomenclature given to the payment should make no difference in principle, and the totality of such payment must in the eye of the parties and in the eye of law be regarded as rent That in short is the argument presented by Mr V K Thiruvenkatachari

In *Karnani Properties Ltd* v *Augustine*[1], the question arose whether certain payments stipulated to be paid by the tenant could in law be called rent The West Bengal Premises Rent Control Act under which the question arose did not define rent Their Lordships of the Supreme Court observed that in the absence of any such definition in the relevant Act, the expression must be taken to have its ordinary significance and that the term *rent* is comprehensive enough to include all payments agreed by the tenant to be paid to his landlord for the use and occupation not only of the building and its appurtenances but also furnishings, electric installations and other amenities agreed between the parties to be provided by and at the cost of the landlord The question that arose there was whether the charges in respect of other amenities, which were so includible in the term *rent* could come within the purview of the Rent Controller under the Act in determining the standard rent or a fair and reasonable rent. In that case, the relevant clause in the contract of lease provided that the rent stipulated was inclusive of charges for current, for fans, lights radio, electric stove . . use of left . and the owners and occupiers

1 (1957) S C J. 177 (1957) S C R 20 A I R 1957 S C 309

shares of municipal taxes. The contention was apparently advanced that whereby stipulation between the landlord and the tenant the landlord agrees to provide additional amenities, the case is taken out of the operation of the Act Their Lordships refer to certain English decisions and conclude that the sum total of the payments in respect of the building or part of the building and other services and amenties would consitute rent. They say at page 28:

> "If, as already indicated, the term "rent" is comprehensive enough to include all payments agreed by the tenant to be paid to his landlord for the use and occupation not only of the building and its appurtenances but also of furnishings, electric installations and other amenities agreed between the parties to be provided by and at the cost of the landlord, the conclusion is irresistible that all that is included in the term "rent" is within the purview of the Act. . ... .."

It will be remembered that in the present case also, the original registered lease did make the tenant liable to contribute towards the taxes in addition to a sum which was specifically described as rent. But this authority certainly supports the contention that the total of the payments made by the tenant, in so far as these payments form the consideration for the right of enjoyment of property, must be regarded as rent

In a decision of the Andhra Pradesh High Court *S. Yusufuddin* v. *A. V. Ramalingam & Co.*[1], the question was considered whether when the tenant had been paying the taxes, such payment could not be held to be part of rent. The learned Judge observed that there is nothing in section 105 of the Transfer of Property Act which would show that such payments would not fall within the meaning of *rent*. The question arose only inc dentally in determining the quantum of fair rent. In *Navanitprasad* v. *Ahmedabad Municipality*[2], the meaning of the expression *rent* in the context of the taxation rules under the Municipal Corporation Act was in question. The learned Judges observed that the primary liability to pay municipal taxes is upon the landlord and not upon the tenant. Where, however there is a covenant between the two and under that covenant the tenant is to pay in addition to the rent the municipal taxes as well, it could well be that that was a consideration while granting the lease, and they held that payment of municipal taxes may well be in the nature of rent, though not strictly so called. They also notice the definition of *rent* in section 105 of the Transfer of Property Act. In *V K. Nivendkar* v *P Ram Singh*[3], the question of a donation received in respect of the grant of a lease was considered. The landlord was a public trust and it agreed to grant the lease of the premises at a monthly rental of Rs. 85 in favour of the tenant on a payment of a further sum as donation to the building fund of the *sangh*. The receipt of this sum was admitted by the landlord. The question was whether the amount was received as premium as a condition precedent of the letting of the premises, which was opposed to the provisions in the Bombay Rents Hotel and Lodging Houses Rates Control Act, 1947, and their Lordships held that as the donation was rece ved in respect of the granting of the lease and not as a free donation, it would come within the expression of premium or consideration in the relevant section. The principle of this decision would certainly appear to apply in the case of payments stipulated to be paid by the tenant to the landlord as part of the lease arrangement.

Mr. V Thiagarajan, learned Counsel for the respondent-landlords, contends that the rent under the lease is only Rs 225 stipulated as rent in the registered lease deed ; or at the highest it could only include the two sums specified in that document, that is to say, the annual payment of Rs 225 towards repairs and the further sum of Rs. 220 as annual contribution towards taxes There is certainly no doubt that the payment of a portion of the tax was a condition precedent to the grant of the lease and if that operated as consideration for the grant of the lease, that sum also

1 (1958) Andh. L T 723.
2. A I R. 1957 Bom. 163.
3. (1963) 2 S C J. 453.

would partake of the character of rent. It is not denied by Mr. Thiagarajan that by a subsequent agreement between the parties the tenant was in fact contributing a sum of over Rs. 1,000 per year towards excess taxes. Why this payment of taxes should assume a character different from the quantum of Rs. 220, expressly specified in the lease deed as payable towards the taxes, I am unable to see. Reliance has been placed upon *Tej Singh* v *Soora Subbarayulu Chetty*[1] In that case, the Rent Controller had fixed the fair rent of the premises. On appeal, the appellate authority thought that the payment of the taxes and the amounts spent for repairs by the tenant could not properly be taken into consideration for fixing the fair rent. This view was held to be incorrect in this decision It was pointed out that in fixing the fair rent, regard could under the Act be had also to the circumstances of the case including any amount paid by the tenant by way of premium or other like sum in addition to rent. The learned Judges did not pronounce finally on the question whether the taxes payable by the tenant under a special contract would fall within the phrase *any amount paid by the tenant by way of premium* They limited the question before them only to a consideration whether such payment would be one of several circumstances of which account should be taken in fixing the fair rent. I am unable to see anything in this decision which supports the contention of Mr. Thiagarajan that the payment of the taxes, though stipulated for, cannot be regarded as rent.

Reference has been made by Mr. Thiagarajan to Halsbury's Laws of England, 3rd Edn., Vol. 23. In paragraph 1194, the learned author lists out payments which are not rent. One of these is :

> "........ payments by way of increased rent which the tenant agrees to make subsequently to the demise. A payment to the landlord in respect of rates is not rent where he is entitled by statute to be reimbursed rates recovered from him."

I shall presently refer to the English decisions bearing upon this point. In *Phillips* v. *Long*[2], the landlord had let the premises at a rent the figure of which brought it within the scope of Small Tenants Recovery Act. The tenant paid the rates on the premises until 1943 Subsequently thereto, the local authority directed that the rates should be paid by the owner and not by the occupier. The owner paid the rates and sought to recover it from the tenant The Stipendiary Magistrates held that taking the rent together with rates, the total amount exceeded £ 20 a year and took it out of the scope of the Small Tenants Recovery Act What was ultimately decided by the King's Bench Division was that by reason of the Rating and Valuation Act, 1925, the owner obtained the right to be reimbursed by the occupier for any rates which he had to pay under that Act, but that did not make the amount so *reimbursed* part of the rent of the premises, the statutory right to be reimbursed being quite different from his right to claim rent In that case, in seeking to recover this amount, the landlord sought to distrain The right to reimbursement, the King's Bench Division held, could not be equated to a right of recovery of rent by way of distraint This does not appear to be an authority for holding that the rates paid by the tenant can never become part of the rent On the other hand, the impact of several different enactments one upon the other was considered in this decision as limiting the right of the landlord in the matter of recovery.

An English decision referred to by the Supreme Court in *Karnani Properties Ltd.* v *Augustine*[3], may be referred to at some length In *Property Holding Co , Ltd.* v *Clark*[4] the premises was let for a rent of £110 a year and an additional payment of £30 a year in consideration of certain amenities provided for by the landlord Following a notice to quit, the tenant became a statutory tenant under the Rent Restrictions Act Simultaneously, the landlords gave a notice to the tenants raising the rental

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1 (1951) 1 M L J 183 A I R 1951 Mad 633 (1).
2 63 T.L.R. 127
3 (1957) S C J. 177 (1957) S.C R 20 : A I R 1957 S C 309
4 (1948) 1 All E.R. 165.

and sued for arrears of rent But the County Court held that only £ 110 was the rent. But the Court of Appeal viewed it differently Scott, L J, observed at page 169 :

> " I reject the contention that a covenant to pay cannot be a covenant to pay rent unless the payment is called 'rent' in the lease or agreement It is the substance that matters, and I am satisfied that in this case the £ 30 a year was a part of the rent within the meaning of the Rent Restrictions Acts The total rent, therefore, was £ 140 . . . . . "

The question of the rates paid by the tenant and its nature were considered in *Sidney Trading Co* v *Finsbury B C* [1] In that case, the tenant had agreed to pay to the landlord for transmission to the appropriate authorities all the existing or future general and water rates, and the question was whether the payment of these rates was rent for the purpose of the relevant enactment The decision cited earlier *Property Holding Co., Ltd* v *Clark*[2], was held to lay down authoritatively the test for deciding what is the rent for the purpose of the Act Lord Goddard observed in *Sidney Trading Co* v *Finsbury B C* [1], at page 461

> " What is the total monetary payment to be made by the tenant to the landlord? One has not to regard the rent from the common law point of view of something issuing out of land for which a distress could issue So, here, in substance, the monetary consideration which the tenant agreed to pay for this tenancy —leaving the premium out of the question—is the £ 5-4 *S* plus a certain sum for rates. It seems to me on the authority of the two cases which I have mentioned that it matters not whether the payment is for rates, for service, or for the use of furniture. If there is a sum of money which the tenant agrees to pay as a consideration for the tenancy, it is for this purpose a rent "

It is, however, contended by Mr. Thiagarajan that dispite the provision in section 105 of the Transfer of Property Act and the general principle derivable from the decisions, cited above, where the Rent Control Act is in force, the position is different Reference has been made by the learned Counsel to section 6 of the Madras Buildings (Lease and Rent Control) Act, 1960, and it is argued that this provision enables the landlord to claim from the tenant the excess of the amounts of taxes and cesses as between the two dates specified in that section, in addition to the rent payable for the building under this Act It is contended accordingly that the statute itself provides that the landlord can recover the excess of taxes, and if that is so, that excess cannot be regarded as part of the rent I am not convinced of the correctness of this argument It is true that section 6 provides that where subsequent to the demise of the premises the taxes have increased, such increase not being due to an increase of rent in respect of the building, the statute comes to the rescue of the landlord and enables him to recover that excess from the tenant But we are concerned here not with a right secured to the landlord under section 6 of the Act but with the position as it emerges from the agreement between the parties. The case-law that has been referred to earlier deals with such a situation, *viz* , where by a contract the tenant has agreed to pay the rates, the amount of such rates is necessarily part of the rent, for the payment of the rates is also in consideration of the right of the enjoyment of the premises Nor am I willing to attach any importance to the marginal note which reads *Increase over the rent in certain cases* or the expression *that the landlord is entitled to claim such excess from the tenant in addition to the rent* as indicating that the excess taxes enjoy a character different from that of rent Turning to the predecessor Act, Act XXV of 1949, the corresponding section 5-A of that Act bore the marginal note *Increase of rent in certain cases* The somewhat different terminology used in the marginal note in the 1960 Act does not to my mind make

1. (1952) 1 All E R 460. 2. (1948) 1 All E.R. 165

such excess anything different from rent In any event, where by agreement of parties, the tenant undertakes to pay the taxes as well, it is well-settled on the authority of the decisions referred to above that that is part and parcel of the rent

It would necessarily follow that the rent of the premises is in the region of Rs. 419 and odd per month.

An argument was advanced that the rent is in respect of more than one building. The extract from the municipal register has been produced to show that two door numbers have been allotted to these premises. It is also stated that a zinc-sheet-roofed shed has been put up by the tenant itself with regard to the ownership of which there is dispute and that part of the taxes is referable to this shed. I am called upon by Mr Thiagarajan to construe that the tenancy is thus in respect of more than one building and if we take each building separately, the rent therefor must necessarily fall below the limit of Rs 400. I am unable to accept this argument for the following reason. The tenancy started under the original registered agreement of 1935 and was undoubtedly in respect of a single premises only That the municipality for the purpose of its own has given it more than one door number cannot make the contract of letting a letting in respect of more than one building That has no relevance to the question under consideration Apart from that, even as long back as 1948 or 1949, by agreement between the landlord and the tenant, the tenant had been paying a sum of Rs. 1,000 and odd as his contribution towards the taxes for the entire premises In the case of non-residential buildings, it seems to me that it would be illogical to split up a premises which was the subject-matter of a single letting into different buildings within the meaning of the Act For instance, in the case of a factory which may consist of administrative building or other outhouses in addition to the main building, the entire premises would be the subject-matter of single letting and if it is split up into a letting of more than one building, the purpose of letting itself, which is the basis of the contract between the parties, would be destroyed. The present position is analogous thereto. I am not prepared, therefore, to agree that more than one building is involved in this case or that the rent of each building would be below Rs 400.

It is the contention of the petitioner that the tax in respect of the shed put up by the tenant is not in fact included in the quantum of tax which the tenant has been paying and that there has been a separate assessment in the tenant's name for this shed. The dispute with regard to the ownership of the shed is irrelevant in the present context Mr V K. Thiruvenkatachari for the petitioner called upon the respondent to file an affidavit to sustain his contention that there had been no separate assessment of the zinc shed or that the landlord had always been paying the tax in respect of that construction For the petitioner, it was claimed that it has been paying the tax thereon, independently of the tax on the rest of the property. No such affidavit has been filed and I must take it that the respondent's contention that tenants' tax contribution includes the tax on the zinc shed has failed to be substantiated It would thus follow that the total amount of monthly rent, taking within the term all the payments made by the tenant in respect of the demised property excluding the zinc shed, exceeds Rs 400

Nextly it was contended that though on the date on which the application for the fixation of the fair rent was filed by the landlord, the building which bore a monthly rental of over Rs 400 stood outside the scope of the Act section 30 of the Act has been amended by Act XI of 1964 deleting this exemption in the case of non-residential buildings It is argued that the Court could take note of the change in the law and apply it as it exists at the present time I am by no means convinced of the applicability of this general principle in this case The question is whether on the date on which the landlord made the application, such application was at all maintainable If it was not, the Court had no jurisdiction to entertain it as on that day and deal with it It may be that today after the passing of Act XI of 1964 the landlord could maintain the application The position is that there was no right in the landord to make an application of this kind prior to the passing of

Act XI of 1964 Such right was created by that Act. It should necessarily follow that the petition was not maintainable and should be dismissed.

In the result, the writ petition is allowed In the circumstance of the case, there will be no order as to costs

V.K. ——— *Petition allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Civil Appellate Jurisdiction)

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR JUSTICE N. KRISHNASWAMI REDDY.

S.K M. Muhammed Mustafa Marakayar . *Appellant**

v.

Udayanachiammal and others .. *Respondents.*

Madras Estates (Abolition and Conversion into Ryowari) Act (XXVI of 1948), *sections* 3 *and* 59—*Undertenure estate, including pannai lands therein, subjected to mortgage—Subsequently, estate notified and taken over under the Abolition Act—Effect on right of mortgagee—If can proceed against pannai lands in execution of mortgage decree—Interest payable on the debt—If stops from date of deposit of compensation under section* 54-*A*.

The scheme of the provisions of the Madras Estates (Abolition and Conversion into Ryotwari) Act is that with effect from the date of the notification or the date prescribed therein, the entire estate is transferred to and is vested in the Government. But this is subject to the provisions providing otherwise. Notwithstanding the vesting of the entire estate possession of lands for which ryotwari pattas shall have to be granted is not to be disturbed unlike the rest of the estate notified and taken over. The provisions relating to grant of ryotwari patta show that once the character of the land is determined, patta should perforce issue. In other words, the person in possession of lands for which he is entitled to a ryotwari patta will get patta not as a matter of grace but as of right. In effect both possession and title of a person who is entitled to a ryotwari patta are saved from the effect of the notification under section 3 (*b*) and the ownership in such lands continues in the quondam landholder notwithsanding the notification and the fact that it is subject to determination of the character of the land for which he will be entitled to a ryotwari patta. The only change, however, brought about is not to the ownership but to the tenure of the land for which ryotwari patta is granted. Before notification such land was subject to payment of *peshkush* and after the notification, its character as private or ryoti land is destroyed and it will be held after the notification and determination of its character and grant of ryotwari patta as ryotwari land subject to payment of assessment as finally settled under section 22.

It will therefore follow that a mortgagee of an undertenure estate can proceed against the pannai or private lands comprised in the estate, in execution of the mortgage decree obtained by him, even after the entire estate has been notified and taken over under the Act and the contention that the remedy of the mortgagee is entirely confined to the compensation paid or to be paid to the landholder, is untenable

Rana Sheo Ambar Singh v *Allahabad Bank*, (1962) 1 S C J. 679 : (1962) 2 S C R. 441 : A.I R 1961 S C 1790, distinguished; *Seethalakshmi* v *Krishnaswami*, I.L R. (1961) Mad 265 and *Sidheswar Prasad Singh* v *Ram Saroop Singh and others*, A I.R 1963 Pat 412 (F B.), relied on

In any case, even assuming that the mortgagor's ownership of the pannai or private land was extinguished as a result of the notification under the Act, they

* Appeal No 359 of 1961 5th December 1966.

can, on the grant of ryotwari patta, be proceeded against as substituted security. Private land for which patta has been granted but on a ryotwari tenure is undoubtedly "other property" within the meaning of section 59 (1) (*b*), which is comprehensive enough to include pannai or private lands for which the mortgagor was granted ryotwari patta. It follows that section 59 (1) does not act as a bar to the mortgagee proceeding againt the erstwhile private or pannai lands in execution of the mortgage decree, after the grant of patta.

The vesting under section 3 (*b*) of the Act free of all encumbrances does not have the effect of destroying the debt enforceable against the land holder, but leaves the liabilities as between the creditor and the debtor intact, and the Act touches the debt only in so far as it affects the Government both in relation to the vesting pursuant to the notification and to the payment of compensation. That being the case, the contention cannot be accepted that interest comes to a stop *in toto* from the date of deposit of compensation under section 54-A. There is no reason why the Act, having regard to its declared policy and intention, should deprive a creditor of interest as stipulated in the contract.

Appeal against the decree of the District Court (Additional), Ramanathapuram at Madurai, dated 24th October, 1960 and made in Original Suit No. 16 of 1960.

V. Vedanthachari for *N. Sivamani* and *M. V. Krishnan*, for Appellant.

R. Gopalaswami Ayyangar and *S. Ramasubramaniam*, for Respondents.

The Judgment of the Court was delivered by

Veeraswami, J.—The third defendant, who is one of the legal representatives of the original mortgagor is the appellant. The first respondent as assignee of the suit mortgage, dated 9th September, 1937, sued on it and asked for sale of a part of the hypotheca in default of payment. Most of the al enees of parts of the hypotheca have been impleaded as defendants in addition to the legal representatives of the original mortgagor who died in about 1942. Various defences were raised of which the substantial one was whether the properties mentioned in the plaint B schedule were liable for the mortgage amount and whether the suit was not barred under the provisions of the Madras Act XXVI of 1948. Among the other minor questions were whether the plaint B schedule properties formed part of the mortgage and whether the debtors were not entitled to the benefits of the Madras Act IV of 1938. On all these questions, the 1st respondent succeeded.

The mortgage was by one S K. Muhammed Aliar Marakayar for repayment of a sum of Rs. 15,000 on a number of items of properties of which Perayur village was one which was admittedly an undertenure estate in the zamindari of Ramanathapuram The entirety of the village being the subject-matter of the mortgage, there is no doubt that the pannai lands therein also would form part of the hypotheca. On the other question as to the applicability of the Madras Act IV of 1938, no arguents have been addressed to us. We also think that the Court below on that question came to the correct conclusion. The matter in controversy thus turned only on whether the pannai lands in the Perayur village could be proceeded against in execution of the mortgage decree.

The zamin of Ramanathapuram was notified and taken over under the provisions of Act XXVI of 1948, with effect from 9th September, 1949 and the notification included the undertenure estate. The contention for the mortgagor before the Court below was that the effect of the notification under section 3 (*b*) of the Act was that the undertenure village in its entirety on and from the date of the notification stood transferred to and vested in the State Government free of all encumbrances so that the rights of the mortgagee could only be worked out as provided by the Act and against the compensation awarded to the landlholder in respect of the undertenure estate On the other hand, what was urged for the mortgagee was that compensation was paid by the Government only for the melvaram interest of the landholder and as, for the pannai lands, the landholder was entitled to get a

ryotwari patta, there was only a change of tenure and no transference of ownership and that, therefore, execution could be levied against the pannai lands The Court below relied on the terms of section 59 (1) (*b*) and allowed execution

The same contention is reiterated by the appellant before us but on slightly different reasoning It is said that as a result of the notification, the title of the landholder to the entirety of the undertenure estate was extinguished as such including the pannai lands and that having regard to the scheme of the Act, the remedy of the mortgagee whose rights cease as against the Government and against the interest of the landholder in the quondam estate is entirely confined to the compensation paid or to be paid to the landholder under the Act. If the landholder is entitled to a ryotwari patta for pannai lands and is granted one, that is a conferment on him under the provisions of the Act and is a new right. The bar under section 59 is comprehensive so as to preclude the mortgagee from proceeding against the property for which the landholder has obtained, a ryotwari patta even on the principle of substituted security This argument is countered for the first respondent on the ground that the effect of the notification is a qualified one so far as ryoti or pannai lands are concerned, that in respect of such lands, patta granted to the landholder is related to his pre-existing title to the pannai lands and that in that sense there is continuity of ownership so that the erstwhile pannai lands are still available to be proceeded against in execution of the mortgage decree It is also contended that even on the assumption that pannai lands too stood transferred to and vested in the Government on the notification, after the grant of patta for such lands, they should be regarded as substituted for the original hypotheca and on this basis too, they could be proceeded against.

In order to appreciate the rival contentions we have to notice the relevant provisions of the Act The Madras Estates (Abolition and Conversion into Ryotwari) Act (Madras Act XXVI of 1948), was intended to provide for the repeal of the permanent settlement, the acquisition of the rights of landholders in permanently settled and certain other estates in the then Province of Madras and the introduction of ryotwari settlement in such estates. Section 2 defines an *estate* to include an undertenure or an inam estate Section 3 provides for taking over all estates and describes also the consequences of taking over by notification It opens with the words *with effect on and from the notified date and save as otherwise expressly provided* in the Act, repeals certain named enactments and by clause (*b*) provides:

> " (*b*) the entire estate (including all communal lands and porambokes; other non-ryoti lands; waste lands, pasture lands; lanka lands; forests; mines and minerals, quarries, rivers and streams, tanks and irrigation works; fisheries, and ferries), shall stand transferred to the Government and vest in them, free of all encumbrances and the Madras Revenue Recovery Act, 1864, the Madras Irrigation Cess Act, 1865, and all other enactments applicable to ryotwari areas shall apply to the estates,"

Clause (*c*) is to the effect that all rights and interests created in or over the estate before the notified date by the principal or any other landholder, shall as against the Government cease and determine Clause (*d*) of the section relates to taking possession and it says that on notification and after removal of any obstruction that may be offered, the Government may forthwith take possession of the estate and with it accounts, registers, muchilikas, maps, plans and other documents relating to the estate But this clause has a proviso:

> " Provided that the Government shall not dispossess any person of any land in the estate in respect of which they consider that he is *prima facie* entitled to a ryotwari patta—
>
> (i) if such person is a ryot, pending the decision of the Settlement Officer as to whether he is actually entitled to such patta;
>
> (ii) if such person is a landholder, pending the decision of the Settlement Officer and the Tribunal on appeal, if any, to it, as to whether he is actually entitled to such patta."

Under clause (*e*) the principal or any other landholder and any other person, whose rights stand transferred under clause (*b*) or cease and determine under clause (*c*), shall be entitled only to such rights and privileges as are recognised or conferred on him by or under the Act. Clause (*f*) extinguishes on the notification the relationship of landlord and ryot as between them Clause (*g*) says that any rights and privileges which may have accrued in the estate, to any person before the notified date, against the principal or any other landholder thereof, shall cease and determine, and shall not be enforceable against the Government or such landholders, and every such person shall be entitled only to such rights and privileges as are recognised or conferred on him by or under the Act Pausing here for a moment, the effect of notification under section 3 (*b*) is subject to the words *save as otherwise expressly provided in the Act* Though the entire estate on notification shall stand transferred to and vest in the Government free of all encumbrances, possession in the hands of a ryot of ryoti land or in the hands of a landholder of lands for which he will be entitled *prima facie* to a ryotwari patta is not to be disturbed, pending a decision as provided under the Act on the character of the land It is also to be noted that all rights and interests created in or over the estate before the notified date by the landholder shall cease and determine as against the Government and the persons whose rights and interests stand so transferred or determined shall be entitled to such rights and privileges as are recognized or conferred on them by the Act The same principle applies to persons in whose favour any rights and privileges have accrued in the estate before the notified date. Section 11 then provides for grant of ryotwari patta to ryots in possession of ryoti lands and certain other types of land mentioned therein. Once the character of the land is established under the section, the ryot shall be entitled to a ryotwari patta with effect on and from the notified date Likewise a landholder, inamdar or an undertenure landholder shall also be entitled to ryotwari patta for certain types of lands under sections 12 to 14 including pannai or private lands within the meaning of section 3 (10) (*a*) of the Estates Land Act, 1908. Sections 18 and 19 cover taking over all buildings along with the estate with certain exceptions and sections 19-A and 20 deal with persons admitted into possession of non-ryoti lands in certain circumstances and rights of certain lessees and others. We have then a bunch of sections 24 to 39 which provide for determination, apportionment and payment of compensation. Compensation payable under these sections is a certain multiple of the basic annual sum which is the aggregate of certain specific components One of such components is one-third of the gross annual ryotwari demand in respect of all lands in the estate in respect of which any person other than the landholder is entitled to a ryotwari patta as ascertained under section 28 less the deductions specified in that section. That means that private land does not enter into this component, namely, gross annual ryotwari demand In the same way another component of basic annual sum, namely, the average net annual miscellaneous revenue is also not inclusive of the source from lands in respect of which the landholder is entitled to a ryotwari patta The reason for excluding private lands is obvious, for, those are lands for which the landholder shall be entitled to a ryotwari patta That is the reason, why apparently, no compensation is paid for such lands. Section 41 deals with deposit by Government of compensation with the Tribunal and sections 42 to 45 relate to apportionment of claims and their settlement against the compensation. There are other provisions as to how the compensation is to be deposited by Government including advance and interim payments Sub-sections (1) and (2) of section 59 read

"59. (1) No claim or liability enforceable immediately before the notified date against the principal or any other landholder of an estate, or against any other person whose rights stand transferred to the Government in pursuance of section 3, clause (*b*) shall on or after that date, be enforceable against the interest he had in the estate, and all such claims and liabilities shall (after the date on which the deposit in pursuance of section 54-A is made) be enforceable—

(a) against the interim payments or the compensation or other sums paid or payable to him under this Act, to the same extent to which such claims and liabilities were enforceable against his interest in the estate immediately before the notified date; and

(b) against his other property, if any, to the same extent to which such claims and liabilities were enforceable against such property immediately before the notified date.

(2) No Court, shall, on or after the notified date, order or continue execution in respect of any decree or order passed against the principal or any other landholder or any other person aforesaid, against the interest he had in the estate; and execution shall be ordered or continued in such cases in conformity with the provisions of sub-section (1), only as against the interim payments or against the compensation or other sum or sums paid or payable to him as aforesaid, or against his other property, if any."

We shall presently deal with, what, in our opinion, is the effect of section 59. The scheme of the provisions which we have briefly referred to, is, as we think, that with effect from the date of the notification or the date prescribed therein, the entire estate is transferred to and is vested in the Government. But this, as we mentioned, is subject to the provisions providing otherwise. What are those provisions and what is their effect? Notwithstanding the vesting of the entire estate possession of lands for which ryotwari pattas shall have to be granted is not to be disturbed unlike the rest of the estate notified and taken over. The provisions relating to grant of ryotwari patta show that once the character of the land is determined, patta should perforce issue. In other words, the person in posesssion of lands for which he is entitled to a ryotwari patta will get patta not as a matter of grace but as of right which is recognised by these sections. Sub-sections (b) and (d) of section 3 read with sections 11 to 14 to our minds make it clear that the vesting of the estate absolutely in the Government on and from the notified date is subject to those provisions, namely that the person who shall be entitled to a ryotwari patta will not be disturbed from possession and once the character of the land is determined as ryotwari or those described in any of the sections 12 to 14, in recognition thereof such person in possession of such lands shall be granted ryotwari patta. In effect both possession and title of person who is entitled to a ryotwari patta are saved from the effect of the notification under section 3 (b) and the ownership in such lands continues in the quondam landholder notwithstanding the notifictions and the fact that it is subject to determination of the character of the land for which he will be entitled to a ryotwari patta The only change, however, brought about is not to the ownership but to the tenure of the land for which ryotwari patta is granted. Before notification such land was subject to payment of peshkush and after the notification, its character as private or ryoti land is destroyed and it will be held after the notification and determination of its character and grant of ryotwari patta as ryotwari land subject to payment of assessment as finally settled under section 22. It was obviously for this reason that even in the computation of the quantum of compensation so payable such private lands were not taken into account and expressly excluded from that context We do not rely upon this feature to establish continuance of the ownership in the quondam landlord in such land but the exclusion from the computation of compensation of such lands appears to be logical because the ownership in such lands is continued. The continuance of such ownership with the quondam landholder, though under an altered tenure, is quite in keeping with the intention of the Act which, as we mentioned, was directed to the abolition of the Permanent Settlement, the acquisition of the rights of landholders in permanently settled and certain other estates and to bring into being ryotwari settlement in such estates.

That was the view consistently taken by this Court so far In Civil Miscellaneous Petition No. 8017 of 1950, and connected petitions the then learned Chief Justice and Venkatarama Ayyar, J., while rejecting the contention that the Act

was *ultra vires* because among other grounds, it did not provide for compensation for pannai lands, observed:

"This contention is, in my opinion, without substance It is a matter of common knowledge that the income from the private lands was taken into account in fixing the peshkush at the time of the Permanent Settlement So these lands were subject to peshkush. It is true that except for this burden the zamindar was enjoying the full income from these lands. But even under the provisions of the impugned Act the zamindar is allowed to continue to enjoy full income from these lands. Only, instead of the burden of the peshkush there is now the burden of ryotwari assessment. Surely the Zamindar cannot both have the lands and also ask for the income from the lands to be included in the computation of the basic annual sum The ownership of the lands subject to assessment is with the Zamindar."

Even more directly in point is *Seethalakshmi* v *Krishnaswami*[1], where a similar question as in this case was decided. That was a case of a charge created for unpaid purchase price under a sale deed relating to the estate After the estate was notified under Madras Act XXVI of 1948 and taken over, the landholder who had created a charge over the estate obtained ryotwari pattas for certain private or homefarm lands in the estate under section 12 of the Act In a suit to enforce the charge, *inter alia* against such private or homefarm lands, it was contended that the lands could not be proceeded against as after the notification and taking over, they ceased to be private lands and ryotwari pattas had since been issued in respect of them The lower appellate Court was not prepared to accept that contention and when the matter came up here in second appeal, an application for stay of the passing of the final decree came up before a learned single Judge of this Court who said that by virtue of the notification the Government had in no way put an end to, modified or altered the mutual rights between parties in regard to pannai lands over which the charge had been created and that the patta lands should be deemed to be substituted security for the pannai lands. But when the second appeal came up for final disposal before the same learned Judge, he considered that the appeal should be disposed of by a Division Bench as it raised a question of importance It was accordingly heard by a Division Bench to which one of us was a party The contention was that the Act was a piece of expropriatory legislation and the effect of the notification under section 3 was to completely destroy the rights *inter se* between the charge-holder and the persons who created the charge. The Division Bench did not accept this view as there was a provision entitling a mortgagee of an estate to obtain relief by payment of the amount due to him from and out of the compensation deposited by Government On the more important aspect, the argument was that the pannai lands as such had ceased to exist and that though in respect of the same lands ryotwari pattas had been issued to the landholder, they could not be deemed to be subject to the charge created by the landholder. Rejecting this contention, the Bench observed at page 267:

"Under section 12 of the Act in the case of Zamindari estate, the landholder *shall* be entitled to a ryotwari patta in respect, among other lands, of what can be established to be private lands within the meaning of section 3, clause (10) (*d*) of the Estates Land Act If in this case ryotwari patta has been issued, it is only because they have been established to be private lands If instead of issuing ryotwari patta the Government had taken the interest in these private lands and awarded compensation for them, surely it cannot be contended that the charge-holder will not be entitled to have the amount of compensation If that be so, we fail to see why the chargeholder should be deprived of his security over the same lands which though they have ceased to be private lands continue to be the property of the landholder. Only before the notification these lands were subject to the payment of peshkush along with other lands in the estate, but after issue of pattas they would be subject to the ryotwari assessment. This Court took this

1. I.L R (1961) Mad 265

view in an early case, *vide* Civil Miscellaneous Petition Nos 8017 of 1950, etc. and 1032 of 1951. We pointed out that the ownership of private lands must be deemed to continue with the Zamindar and there has only been a change of the nature of the burden on such lands It follows that the charge would continue to subsist in respect of the private lands for which under section 12 a ryotwari patta has been issued to the landholder."

This decision is conclusively against the appellant and in fact Sri Vedanthachari for the appellant did not contend that it is not so. But he relied on a decision of the Supreme Court and argued that in view of it, the view that found favour with this Court in the two cases could no longer prevail. We will deal with this contention presently. We find that before and after the decision of the Supreme Court relied on by the appellant, the Patna High Court has taken the view in two cases similar to that of this Court. The Patna High Court was concerned with the provisions of the Bihar Land Reforms Act, 1950 and the effect of notification and taking over of the estates in relation to the ownership of *bhumidari* lands which had been subject to a charge prior to the Act. *Mahant Sukhdeo Das* v. *Kashi Prasad Tewari*[1], which was decided by a Full Bench of the Patna High Court held that under the provisions of that Act, a decree holder mortgagee of the interest of the proprietor, whose estate had vested in the State under section 3 was entitled to proceed against the bakasht lands of the proprietor comprised in the said estate for recovery of the dues under this mortgage decree and that the mortgagee could not be forced to seek his remedy as provided in section 14 and to satisfy his mortgage debt out of the compensation payable under the Act The Court referred to sections 3 and 3-A under which the entire estate vested in the State absolutely and not only the right, title and interest of the proprietor or tenure-holder, but was of the view that the word *vest* did not imply that after the date of vesting no interest at all was left with the ex-proprietoror ex-tenure-holder The Court further observed that this was because section 4 was subject to the qualification enacted in clause (*a*) of the same section which was to the effect that the proprietor or tenure-holder after the vesting should cease to have any interest in the estate or tenure other than the interests ex-pressly saved by the povisions of the Act One of the interests saved was what was laid down in section 6 of the Act, namely, that bakasht land would continue to remain in possession of the ex-proprietor or tenure-holder but not in the character of bakasht lands but as ryoti lands In view of this the Court held

" . the combined effect of sections 3, 3-A, 4 and 6 is that the lands in cultivating possession of the intermediaries do not vest absolutely in the State but remain with the intermediaries and will be deemed to be settled with them . The right of the State so far as those lands are concerned is restricted only to realisation of rent that may be assessed on such lands in accordance with the provisions of the Act (but it will not be entitled to resume bakasht possession of them) .

Section 4 (*d*) bars a suit in a civil Court for the recovery of any money due from such proprietor or tenure-holder the payment of which is secured by a mortgage of, or is a charge on, *such estate or tenure*

The Patna High Court was of the view that the section did not stand in the way of the mortgagee-decree-holder proceeding against other properties included in the mortgage. Except for the fact that section 6 of the Bihar Land Reforms Act says that while on and from the date of vesting all lands used for agricultural or horticultural purpose which were in khas possession of a proprietor or tenure-holder on the date of such vesting, shall be deemed to be settled by the State with such proprietor or tenure-holder and such proprietor and tenure-holder shall be entitled to retain possession thereof and hold them as a raiyat under the State, the

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1 (1958) I L R 37 Pat 918, (956, 958) A I R 1958 Pat 630

effect of the Madras Act appears to be the same, though the Madras Act does not in so many words say that the lands, for which a landholder will be entitled to a ryotwari patta shall be deemed to have been settled on him by the State. As we already pointed out, section 3 has made it clear that if the person would be entitled to patta he must not be dispossessed of the land until determination of the character of the land and sections 12 to 14 have made it perfectly clear that once the character of the land is established, the person concerned shall be entitled to a ryotwari patta and this is with effect on and from the notified date The grant of patta under those sections read with the protection of continued possession in our view is only in recognition of the anterior title which is continued with different incidence from the standpoint of revenue and the relationship of landlord and tenant

The second case decided by the Patna High Court, is *Sidheswar Prasad Singh* v. *Ram Saroop Singh and others*[1] There again, the Patna High Court held the same view as before, as to the effect of the notification under section 4, in relation to private lands Kanhaiya Singh, J, with whom Ramaswami, C J, agreed, while the third learned Judge differed, observed

"The word 'vest' has not got a fixed connotation and has to be construed in the context of the provisions of a particular statute Under the Bihar Land Reforms Act, though the estate of an intermediary vests in the State by virtue of section 4 read with section 6, the State does not become the full owner of the bakasht lands The intermediary is entitled to retain possession of those lands and continues to be full owner thereof, having absolute and indefeasible right therein with full power of disposal The only change effected is that instead of being a proprietor, he becomes a tenant and instead of revenue he pays rent"

That precisely was the view expressed by this Court in *Seethalakshmi* v *Krishnaswami*[2] The Patna High Court went on to say

"Where the entire estate is mortgaged and where that estate vests in the State and no interest in that estate is left with the mortgagor landlord, it is plain that the mortgagee is debarred under section 4 (*d*) from realising his mortgage debt from the property that has vested in the State In such a case he cannot also enforce the mortgage security against the other property of the mortgagor that has not vested in the State The position, however, is entirely different where the entire interest of the mortgagor landlord in the estate does not vest in the State, but by virtue of section 6 read with section 4 of the Bihar Act some interests in the bakasht land are left with the mortgagor landlord The mortgagee is entitled to follow that property, namely bakasht lands, and enforce the mortgage security against that property, on the ground of accession to the mortgaged property, if not, on the ground of substituted security"

The last observation was made, on the view that bakasht lands which were deemed to be settled with the intermediaries after the vesting of the estate constituted an accession to the mortgaged property, with the result that the mortgagee could proceed against such lands for satisfaction of the mortgage debt The majority in this case accepted the view of the Full Bench in *Mahanth Sukhdeo Das* v *Kashi Prasad Tewari*[3] We do not think it necessary to go so far as to put it on the ground of accession, but it will suffice for our present purpose to say that under the Madras Act, the vesting on the notification of an estate in the Government is qualified by the other provisions of section 3, particularly clause (*d*), and sections 12 to 14, with the result that the ownership in the private lands for which the landholder shall be entitled to ryotwari patta is not put an end to but continues in the landholder even after the taking over of the estate The Allahabad High Court, in *Sheo Amber* v *Allahabad Bank*[4], took the view that the *bhumidari* lands shall be deemed to have been settled by the State on and from the notified date, but under section 18 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, could be proceeded against by

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1 A I R 1963 Pat 412 (1963) I.L.R 42 Pat 192 (F B)

2 I L R (1961) Mad 265

3 (1958) I L R 37 Pat 918 (F B)

4 A I R 1959 All 179

the mortgagee as substituted security. But the Supreme Court in *Rana Sheo Ambar Singh* v. *Allahabad Bank*[1], did not accept that view on a construction of particular provisions of that Act, especially those relating to taking over and its effect under section 6 (*h*) In the view of the Supreme Court, section 6 (*h*) of that Act ruled out application of the doctrine of substituted security to enable the mortgagee to proceed against it

We shall now proceed to consider whether *Rana Sheo Ambar Singh* v. *Allahabad Bank*[1] makes any difference to the view we have taken, as to the effect of the notification in relation to *pannai* or private lands. That case, as we said, related to the Uttar Pradesh Act. That was an Act to provide for the abolition of the Zamidari system, as Madras Act (XXVI of 1948), which involved intermediaries between the tiller of the soil and the State in the Uttar Pradesh and for the accequsition of their rights, title and interest and to reform the law relating to land tenure consequent upon such abolition and acquisition and to make provision for other matters connected therewith Chapter II of this Act covers acquisition of the interests of intermediaries and its consequencs Section 4 (1) provides for notification of estates and states that on such notification all notified estates shall stand transferred to and vest, except as thereafter provided, in the State free from all encumbrances. Section 6 declares the consequences of such vesting. It says that, when the notification under section 4 has been published, in the Gazette, and save as otherwise provided in that Act, the consequences mentioned in that section shall ensue in the area to which the notification related One of such consequences is that all rights, titles and interest of all the intermediaries in every estate in such area including cultivatable or barren land, grove-land, forests, trees, fisheries, wells tanks ponds, water-channels, ferries, pathways, abadi sites, *hats*, *bazaars* and *melas* with certain savings, should cease and be vested in the State free from all encumbrances Another consequence is provided by section 6 (*h*), namely no claim or liability enforceable or incurred before the date of vesting by or against such intermediary for any money, which is charged on or secured by a mortgage of such estate or part thereof shall, except as provided in section 73 of the Transfer of Property Act, 1882 be enforceable against his interest in the estate Section 9 provides for certain exceptions from the consequeces of the notification under section 4 Under that section, all private wells in holdings grove or *abadi* trees and all buildings, situate within the limits of an estate, belonging to or held by an intermediary should continue to belong to such intermediary, and the site of the wells or the buildings with the area appurtenant thereto should be deemed to be settled with the intermediary by the State Government on such terms and conditions as might be prescribed. Section 18 provides that subject to the provisions of sections 10, 15, 16 and 17, all lands in possession of or held or deemed to be held by an intermediary as *sir*, *khudasht* or an intermediary's grove, among other things, held as such by an occupancy tenant on the date immediately preceding the date of vesting shall be deemed to be settled by the State Government with such intermediary who shall, subject to the provisions of that Act, be entitled to take or retain possession as a *bhumidar* thereof In the light of these provisions, the question the Supreme Court had to decide was whether the mortgagee of an estate which included the *bhumidari* land within the meaning of section 18, which formed part of the mortgage could be proceeded against in execution by the mortgagee-decree-holder after the notification and taking over of the estate of which the *bhumidari* lands were a part Before the Allahabad High Court, the two points urged were that the bhumidari rights created by section 18 could not be sold in execution of the decree and that the application for execution was barred by limitation. We are not concerned with the second point The first point was decided by that High Court in favour of the mortgagee-decree-holder In the Supreme Court, the contention for the appellant was that as the bhumidari right in the estate vested in the State under the Act, the mortgagee who was only entitled to get the proprietory rights sold under the mortgage could only fall back on the compensation payable to the appellant

1 (1962) 1 S C J. 679 (1962) 2 S.C R 441 A I R 1961 S.C 1790.

under the Act Strong reliance was placed in support of this contention, on section 6 (*h*). The contention for the respondent (mortgagee-decree-holder) was that bhumidari rights arising under section 18 were liable to be sold, as they represented the proprietory rights, and in any case they could be sold as substituted security in place of the property mortgaged. The Supreme Court after referring to section 4, contrasted the language of section 9 with that of section 18, and held that, while section 9 excepted certain specified lands from the effect of the notification and vesting in the State, section 18 did not make any exception but proceeded on the basis that the lands comprehended by section 18 had vested in the State and that they would on and from the notified date be deemed to be settled by the State on the quondam proprietor The Supreme Court observed in page 1793 :

> 'Section 9 itself shows in what manner the Legislature was making an exception when it did not intend that a particular property should vest in the State. If the intention were that *sir* and *khudkashat* land and grove land should not vest in the State, section 18 would have been worded in the same way as section 9. Further the way in which section 18 is worded . shows that these three kinds of property vested in the State under section 6 (*a*) (1) and were then resettled with the intermediary on a new tenure and not in the same right, which he had in them before the vesting The Legislature was therefore creating a new right under section 18 and the old proprietory right in *sir* and *khudkashat* land and any intermediary's grove land had already vested under section 6 in the State. Therefore, it cannot be said that section 18 is an exception to the consequences provided in section 6 "

The Supreme Court also noticed the fact that the Uttar Pradesh Act did not provide for compensation for the bhumiari lands forming part of the estate taken over. It was of the view that that would not make any difference, as to the legal effect of the notification under section 4 Having taken the view that the bhunmidari lands was a new right conferred on the bhumidari or proprietor, the Supreme Court considered the other question as to whether such bhumiari land as substituted security could be proceeded against On that question, the Supreme Court noticecd section 6 (*h*) and expressed the opinion that it had a two-fold effect, at page 1794 ·

> " In the first place, it makes it impossible for the mortgagee to follow the proprietory right after it vests in the State Secondly it provides that the only way in which the mortgagee can recover his money advanced on the security of the property which vested in the State by virtue of the notification under S 4 and the consequences thereof under section 6 is to follow the procedure under section 73 of the Transfer of Property Act "

On that view, it was held that the doctrine of substituted security could not be availed of by the mortgagee.

Mr. Vedanthachari for the appellant has strongly relied on the decision of the Supreme Court and urged before us that the provisions of the Madras Act are substantially *in pari materia* with those of the Uttar Pradesh Act On that ground it is pressed upon us that the view in *Seethalakshmi* v *Krishnaswami*[1], is no longer good. But on a careful consideration of the question, we are unable to accept that contenttion. In one sense, practically, all the Acts directed to abolish the estates and introduce ryotwari settlement after removing the intermediaries are designed on more or less a common pattern But the analogy cannot be pressed into service, where particular provisions which have a bearing on a matter in dispute, are not identically worded n the Acts taken for comparison. In the Madras Act, though section 3 (*b*) and the opening words of section 3, substantially bear comparison with section 4 (1) of the Uttar Pradesh Act, the Madras Act does not contain anything like section 9 of the Uttar Pradesh Act, nor like section 18 of that Act It is because, as we think, section 9 was especially in contrast with section 18 of the Uttar Pradesh Act, the Supeme Court, was led to think that, when the Uttar Pradesh Act intended

1 I.L R (1961) Mad 265.

to except certain items of property included in the estate from vesting in the State, it used express language, while under section 18 it proceeded on the basis that the lands covered by that section had vested in the State, and on that view sought to resettle them on the bhumidar, while, of course, provision providing that the bhumidars on whom such resettlement was made would retain and continue in possession. In the Madras Act, as we have already pointed out, section 3 (*b*) and (*d*) and section 12 to 14 read together show that the intention of the Legislature is not merely not to disturb the persons in possession of which they are *prima facie* entitled to ryotwar patta, but also they shall, as a matter of right, be entitled to patta on and from the date of the notification and taking over of the estate, though, of course, it is subject to determination of the character of the land as *pannai* or private, as the case may be. Sections 12 to 14 are not comparable to section 18 of the Uttar Pradesh Act, for those sections do not say that, while the persons *prima facie* entitled to patta may not be disturbed from possession, the properties, for which ryotwari patta is granted shall be deemed to be settled on the pattadars as on and from the date of the notification. In fact, section 3 (*d*) and sections 12 to 14 recognise the title of the proprietor or landholder to these lands and in view of it, the Act says that they shall not be disturbed in possession and shall be granted ryotwari patta The position under the Madras Act appears to be very akin to that of the Bihar Act, which was under consideration in *Sidheshwar Prasad Singh* v. *Ram Saroop Singh and others*[1]. There also, as in this Court *Rana Shyeo Ambar Singh* v *Allahabad Bank*[2], was relied on But the Patna High Court distinguished the Supreme Court decision in the following manner :

> "Section 6 (of the Bihar Act) no doubt corresponds to section 18 of the U P. Act, but what is of importance is that under the U P Act the vesting takes place without any reservation, and then certain properties are excepted, such as are enumerated in section 9 of that Act, and then some lands are deemed to be settled with the itermediaries as their bhumidari lands In fact, the provisions of section 9 afforded the clue to the interpretation of the U P Act There is no such provision in the Bihar Act The interpretation, put by the Supreme Court on the U P. Act cannot, in my opinion govern the Bihar Act The decision of the Supreme Court in this case cannot, therfore, be regarded as an authority for overruling the decision of the Full Bench in *Mahanth Sukhdeo Das* v *Kashi Prasad Tewari*[3] .

We are of the same view, as to the applicability of *Rana Sheo Ambar Singh* v. *Alldhabad Bank*[2], to this case As in the Bihar Act, so in the Madras Act, as already mentioned, there is no such provision like section 9 or even section 18 of the Uttar Pradesh Act Far from sections 12 to 14 of the Madras Act saying that the properties for which ryotwari patta was issued shall be resettled or shall be deemed to be resettled from the date of the notification, they merely direct that, when once the character of the land is determined to be pannai or private, ryotwari patta shall be granted We think that the issue of patta is in recognition of the title that inhered before the notified date and continued to inhere in the landholder thereafter to the private lands but only with this difference that after the notifiction the tenure of the land is no longer pannai or private but, on grant of ryotwari patta, becomes ryotwari land subject to payment of assessment

Even assuming that the mortgagors ownership of the private land was extinguished as a result of the notification, we are of the view that, in any case, they can be proceeded against as substituted security It was because of the clear and definite provision contained in section 6 (*h*) of the Uttar Pradesh Act, the Supreme Court in *Rana Sheo Ambar Singh* v *Allahabad Bank*[2], held that the mortgagee could not proceed against the substituted security, and that his only remedy was against the compensation We do not think that section 59 of the Madras Act, which is differently worded can be given the same effect as section 6 (*h*) of the Uttar Pradesh Act We have, in an earlier part of this judgment, noticed the terms of section 59(1) and (2) The second part of sub-seciton (1) expressly provides that the claims

1 (1963) I L R 42 Pat 192, 215 (F B) A I R 1961 S C 1790
(192) 1 S C J 679 (1962) 2 S C R 441 3 (1958) I L R 37 Pat 918 (F B)

and liabilities of the landholder, after the deposit made pursuant to section 54-A be enforceable against the interim payments or compensation and against the landholders other property, if any, to the same extent to which such claims and liabilities, were enforceable against such property immediately before the notified date. Private land for which patta has been granted but on a ryotwari tenure is undoubtedly *other property* within the meaning of the section The word *other* has been used with reference to the items enumerated in the preceding clause, namely, interim payments or compensation or other sums paid or payable to the land holderunder the Act. The only question is what is the effect to be given to *such property* in clause (*b*) of section 59 (1) We are not persuaded that by *other property* is meant such property as in its present form should have existed prior to the notified date There is no reason why the Act, having regard to its purpose and intentions, should bar the charge holders from proceeding with the properties which do not belong to the State. Clause (*b*) of section 59 (1) in our opinion, is comprehensive enough to include the plaint B Schedule properties, namely, the pannai lands for which the mortgagor was granted ryotwari patta. It follows, therefore, that section 59 (1) does not act as a bar, unlike section 6 (*h*) of the Uttar Pradesh Act, to the first respondent proceeding against the erstwhile private lands in execution of the mortgage decree

There remains for consideration the claim relating to interest The Court below has allowed interest at six per cent. per annum from the date of the plaint and at the contract rate as claimed in the plaint for the earlier period. Mr. Vedantachari for the appellant argues that, in view of section 59 (3), no interest will be chargeable after the date of deposit We are unable to accept this contention. The liab lity which sub-section (3) visualises is one that is enforceable against the principal or any other landholder or any other person, and such liability may be enforced either against interim payment or compensation or other sum paid or payable under the Act, or other property of the landholder. Sub-section (3) is not confined to any particular item of liquid asset or immovable property. The whole object of sub-section (3) would appear to be that, when section 54-A allowed six months for the Government to deposit the advance compensation, the Legislature thought that it would be very hard to the landholder to bear simple interest in excess of six per cent. during that period That seems to be the policy behind the sub-section There is no reason why the Act, having regard to its declared policy and intention, should deprive a creditor of interest as stipulated in the contract The vesting under section 3 (*b*) free of all encumbrances does not have the effect of destroying the debt itself, but leaves the liabilities as between the creditor and the debtor in tact, and the Act touches the debt only in so far as it affects the Government both in relation to the vesting pursuant to the notification and to the payment of compensation That being the case, we do not accept the contention that interest comes to a stop in toto from the date of deposit of compensation under section 54-A. We, therefore, slightly modify the decree of the Court below in regard to interest and direct that the mortgagor will pay simple interest at six per cent. per annum for a period of six months from September, 1949 to the date of deposit under section 54-A In other respects, the decree of the Court below will stand. Except to the lim ted extent of modification allowed by us, the appeal fails and is dismissed with costs.

V K. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. RAMAMURTHY AND MR. JUSTICE A. ALAGIRISWAMI

Krishnamurthy Iyer .. *Appellant**

v.

Tiruppangur Sri Sivaloganathaswami Devasthanam by Executive Officer, S Maharajan .. *Respondent.*

Madras Indebted Agriculturists (Repayment of Debts) Act (I of 1955), section 4—Payment of decree debt in four instalments under section 4—Filing of application for final decree three years after the first instalment became payable—Application, if barred with respect to other instalments also.

The Madras Indebted Agricultrists (Repayment of Debts) Act, (I of 1955) came into force on 1st March, 1955 and under it the debt became payable in four instalments, the first of such instalments being payable on 1st July, 1955 and the subsequent instalments being payable on 1st July, 1956, 1st July, 1957 and 1st July, 1958 respectively. Sub-section (2) of section 4 of the Act *inter alia* provided that where in respect of a decree for debt passed before the commencement of this Act, a debtor fails to make any one of these payments specified in sub-section (1), the decree-holder shall be entitled to execute the decree in respect of the instalment which is in default.

On a question whether an application for final decree filed more than three years after the first instalment became payable under that Act barred by limitation?

Held, that the integrality of the decree becoming split up, the decree-holder could not execute his decree except as and when the several instalments became due. That being so, the argument that if the decree-holder fails to apply for a final decree within a period of three years of the failure of the judgment-debtor to pay the first instalment, this remedy is barred not merely in respect of that instalment but all subequent intstalments also, cannot be accepted As the decree became split up and became an instalment decree, the decree-holder could apply for passing of final decree at least in respect of the instalments payable within a period of three years of the date of application for the passing of the final decree.

Appeal against the Decree dated 27th February, 1961 in I.A. No. 822 of 1960 in O.S. No. 15 of 1948, Sub-Court of Mayuram.

K. G Ramaswamy and *A. Sadanand*, for Appellant.

T. K. Subramania Pillai, for Respondent.

The Judgement of the Court was delivered by

Alagiriswami, J.—In this appeal an interesting question arises under the Madras Indebted Agriculturists (Repayment of Debts) Act (I of 1955). The question is whether an application for final decree filed more than three years after the first instalment became payable under that Act is barred by limitation. The facts necessary for decision in this case and which are not in dispute are as follows. A prelim nary charge decree was passed in this case on 8th July, 1949 and the appellate decree on 10th April, 1953 Various sums had been paid towards the decree amount the last of them being a payment of Rs. 2,500 on 28th February, 1953. The application for passing a final decree was presented on 8th September, 1958 There was an acknowledgment Exhibit A-1 dated 21st January, 1954 and even if this is taken into account, the final decree application is beyond three years from that date. Act I of 1955 came into force on 1st March, 1955 and under it the debt became payable in four instalmens, the first of such instalments beingpayable on 1st July, 1955 and the subsequent instalments being payable on 1st July, 1956, 1st July, 1957 and 1st July, 1958 respectively. Act I of 1955 was preceded by Ord nance V of 1953 which came into force on 5th December, 1953 and Act V of 1954 which came into force on 6th February, 1954. Under both these enactments, filing of suits and petitions for execution

* A S No 373 of 1962 2nd February, 1967.

against agriculturists had been stayed. The result was that a period of one year six months and 26 days upto 1st July, 1952 was deduciable in respect of suits and execution petitions that may be filed after 1st July, 1955. That does not apply here because the present petition is one for passing a final decree and not for execution and the date of the appellate decree is 10th April, 1953 When the decree-holder applied for passing a final decree, the jugment-debtor contended that the application having been filed more than three years after 1st July, 1953, was barred by limitation. This contention was overruled and a final decree was passed. The judgment-debtor has preferred this appeal against the order passing a final decree.

The argument on behalf of the appellant is that the decree-holder should have applied for passing a final decree within 3 years after the first instalment became payable on 1st July, 1955 and an application for passing a final decree not having been filed within that period of three years, it was time barred He relied upon sub-section (2) of section 4, which lays down that—

> " Where in respect of a decree for debt passed before the commencement of this Act, a debtor fails to make any one of these payments specified in sub-section (1) the decree-holder shall be entitled to execute the decree in respect of the instalment which is in default."

and argued that in this case the preliminary decree itself being unexecutable, the decree-holder should have applied for passing a final decree within three years of the first instalment becoming payable and if he did not do so, the application for final decree would become barred and the decree will become unexecutable. This argument was itself based on the further argument that more than one final decree for sale cannot be passed. On principle we cannot see why more than one final decree cannot be passed. But for the purpose of this decree it is not necessary to decide that question. It will be noticed that the section itself does not directly apply. This is not a case where as in the case decided in *Kashinath Vinayak* v. *Rama Daji*[1] *and Suklya* v. *Suklal Motichand*[2], the decree itself could be executed without the necessity of a final decree under the provisions of section 15-B of the Dekhan Agriculturists Relief Act.

Under sub-section (1) of section 4 notwithstanding any law, custom, contract or decree of Court to the contrary, an agriculturist shall be entitled to pay any debt due by him in four equal instalments, and under sub-clause (*b*) of section 2 'debt' includes a debt payable under a decree or order of Court. Therefore, notwithstanding the fact that there was a prel minary decreedated10th April, 1953, the judgment debtor in this case was entitled to pay the debt in four equal annual instalments beginning from 1st July, 1955. The integrality of the decree thus became split up and the decree-holder could not execute his decree except as and when the several instalments became due. Further the decree-holder would have to obtain a final decree before he could execute the decree. Whether he applies for a final decree soon after the first instalment became due and the final decree as passed directs the mortgage property to be sold for the recovery of the first instalment, which was payable on 1st July, 1955, and also serially in respect of the other instalments, or whether as in this case, the decree-holder waits till the last of the four instalments became payable on 1st July, 1958 and thereafter applies for a final decree under and the final decree for sale in respect of the amount then payable is passed would not make any difference. An application for final decree will have to be filed under Article 181 of the L mitation Act within three years of the prel minary decree. If the judgment-debtor fails to pay the last of the instalments payable on 1st July, 1958 and the decree-holder applies for passing of a final decree on 2nd July, 1958 or any subsequent date, it would be beyond the period of three years in respect of the first instalment, which was payable on 1st July, 1955. Whatever may be sa'd about the first instalment the application for final decree is within the period of three years as regards the other three instalments That is the case in the present instance We cannot accept the argument on behalf of the judgment-debtor that if the decree-holder fails to apply for a final decree within a period of three years of the failure of the judgment-debtor

1. (1916) I L.R 40 Bom 492 2. (1923) I L R 48 Bom. 172.

to pay the first instalment, this remedy is barred not merely in respect of that instalment but all subsequent instalments also. As the decree became split up and became an instalment decree the decree-holder could apply for passing of final decree at least in respect of the instalments payable within a period of three years of the date of application for the passing of the final decree. This conclusion of ours is amply borne out by authority The decision relied upon by the lower Court and reported in *Gopal Naicker* v. *Alagiriswami Naicker*[1], is itself in point. In that case a preliminary decree on a mortgage suit was passed in June, 1953 providing for the payment of the mortgage money in seven annual instalments of Rs. 115 each in June, of each year with a default clause that if there were defaults in the payment of any instalment, the decree-holder might then proceed to sell the mortgaged property for the whole amount of the instalments still remaining unpaid and also for the sum of Rs. 262 which he had provisionally relinquished No instalment was in fact paid either in 1954, 1955, 1956 or 1957 On 22nd June, 1938 before the 1938 instalment had become due, the decree-holder filed an application for passing a final decree. The debtor contended that the application was barred by limitation. It was held that every fresh default gave rise to a fresh cause of action as the decree-holder in the circumstances was at no time bound to enforce the penalty and the application for final decree was not barred by limitation. In that case also the application for final decree was beyond three years from the date when the first instalment became payable and the final decree application was only in respect of the other instalments. In the present case also the amount due in respect of the first instalment is not claimed in the application for final decree This decision was followed by the Allahabad High Court in *Uttan Singh* v. *Sakal Raj Singh*[2] That too was a case of a preliminary mortgage decree where the amount was payable in instalments and it was held that the cause of action to apply for a final decree accrued not on the default of payment of the third instalment, but also on subsequent breaches and that the application for final decree was competent and the decree-holder was entitled to have final decree passed in respect of the instalments which became due within three years of the application for final decree. This decision followed the Madras decisions above referred to, as also a decision of the Oudh Chief Court in *Bari Dutta* v. *Harpal Singh*[3].

There have been number of decisions of our High Court on the effect of Madras Act I of 1955. In *Sankaralinga Konar* v. *Venkatachala Konar*[4], Jagadisan, J , held that by reason of section 4 of the Madras Indebted Agriculturists (Repayment of Debts), Act, 1955, a decree amount due by an agriculturist is payable in instalments and by force of that statute the decree became an instalment decree that limitation has to be computed accordingly and that an instalment decree does not necessarily mean only a decree which *ex facie* makes a provision for its repayment in instalments. In *Meenakshisundara* v. *Ramachandra*[5], Srinivasan, J , held that by reason of section 4 (1) of the Madras Indebted Agriculturists (Repayment of Debts) Act, 1955, a decree of Court gets converted into a decree for payment of the amount in instalments on specified dates and it is deemed under sub-section (7) to be a subsequent order of Court directing payment of money on specified dates and the period of limitation for purpose of section 48, Civil Procedure Code, in such cases will have to be computed from the respective due dates of the instalments Though both these decisions were concerned with the effect of sub-section (7) of section 4 in relation to execution proceedings they lay down the principle that a decree of Court gets converted into a decree for payment of instalments, and limitation will have to be calculated from the date of each instalment. In *Richal Naidu* v. *Muthuramalingam*[6], a Bench of this Court held that the effect of section 4 of Act I of 1955 was that for purposes of limitation, the integrality of the debt must be severed into distinct parts There the plaintiff filed a suit confining his claim for the amount due for the three instalments which were within time, and the Bench held that where a special enactment, which is invested with an overriding power (with regard to any other

1 I L R (1942) Mad 770 (1942) 1 M L J 532
2 I L R (1945) All 151
3 A I R 1935 Oudh 112
4 I L R (1960) Mad 567 (1960) 2 M L J. 67
5 (1962) 1 M L J 10
6 (1962) 2 M L J 352.

law) confers the right upon the debtor to pay the debt in instalments it is a reasonable interpretation to hold that each instalment will furnish a distinct cause of action and at least for the purpose of limitation and the right to sue, the integrality of the debt must be held severed into distinct parts. In *Chenchamma* v *Kumaraswami Naidu*[1], Jagadisan, J., held that the decree debt recoverable from an agriculturist becomes statutorily converted into an instalment decree payable on the dates mentioned in section 4, sub-section (1) of the Madras Act I of 1955 and that the period of 12 years laid down in section 48 has to be computed only from the date of the default in making the payment and the default would arise only after the dates prescribed specifically in Act I of 1955. This decision also relied upon the two earlier decisions in *Sankaralinga Konar* v. *Venkatachala Konar*[2], and *Gopal Udayar* v. *Mangala Udayar*[3], the first of which was already referred to. In *Samanna Goundar* v. *Thiruvenkada Mudaliar*[4], Veeraswami, J., following the decision of the Bench in *Bichal Naidu* v. *Muthuramalingam*[5], held that Madras Act I of 1955 provided for splitting up, in effect the integrity of a debt and payment thereof by four annual instalments at once the integrity of the debt is so split up, it is then impossible to reckon the period of limitation on the basis of the original cause of action for the debt and in such a case, each instalment constitutes a fresh cause of action so that the creditor will have a new start of limitation from the date when each of the instalments became payable.

Thus there is overwhelming authority for the view that the effect of Madras Act I of 1955 is that a decree is split up into an instalment decree and the period of limitation has to be calculated only from the date of the failure to pay any one of the instalments This rule applies not only to an executable decree but even to a preliminary decree in a mortgage suit which has to be followed by a final decree before it can be executed. Section 4 (1) of Madras Act I of 1955 makes no distinction between a decree which is executable, as such and a decree which has to be made so executable In either case, as the amount due under the decree is payable in instalments it should be deemed to be converted into an instalment decree. Our conclusion therefore is that the present application for a final decree being confined to the three instalments, which were payable within three years of the application for final decree, is in time and the order of the lower Court is correct.

As regards the first instalment towards which the decree-holder purported to adjust a sum of Rs. 320, alleged to be due to the judgment-debtor on some other account, whether it is so adjustable or not, it is not necessary for us to say. Strictly speaking the judgment-debtor's claim for the sum of Rs. 320 having arisen out of a different transaction cannot be set-off against the first instalment due under the decree by the judgment-debtor. But whether the judgment-debtor can take any steps to recover that sum, it is not for us to say in this appeal.

In the result the appeal is dismissed with costs of the respondent.

V.M.K. *Appeal dismissed.*

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1 (1963) 2 M L J 172.
2 (1960) 2 M.L J 67 . I L R. (1960) Mad 567.
3 (1962) 1 M L J 337
4 (1964) 77 L W 297
5. (1962) 2 M.L J. 352.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T. RAMAPRASADA RAO.

Mutharasu Thevar .. *Petitioner**

v.

Mayandi Thevar and others .. *Respondents.*

Contract Act (IX of 1872), section 202—Power-of-attorney—Incidental creation of interest in the subject-matter in favour of the agent—Agency, if an irrevocable one—Principal's right to revoke the vakalat given by his agent.

Section 202 of the Indian Contract Act *inter alia* provides that where the agent has himself an interest in the property which forms the subject-matter of agency the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

In the present case, the agent has been appointed only to expend for the litigation to be and already sponsored by him and to have the right in the future to mortgage or sell the property of the principals for reimbursement of expenses incurred by him. Does the agency create an interest in the subject-matter, which is the *sine qua non* to make the power an irrevocable one ?

Held, that the power-of-attorney incidentally provides for an assurance that the agent can have recourse to the properties of the principals for advances made by him. The word " உறுதி " (uruthi), in the circumstances of this case would rather mean " assurance " and cannot be equated to the expression " security". Therefore, the recitals in the power-of-attorney in question do not create an irrevocable agency in the agent entitling him to object to the relief, *viz.*, to revoke the vakalat given by him, asked for by the principals.

Held also that, the principal has the right to have his Counsel to conduct his litigation, notwithstanding the fact that the agency in question is irrevocable or not.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court, Ramanathapuram, Madurai, in I.A. No. 249 of 1964 in A.S. No. 163 of 1964.

A. V. Narayanaswami Iyer, for Petitioner.

K. Gopalachari, for Respondent.

The Court made the following

ORDER.—The respondent in the lower Court is the petitioner before me. During the pendency of an appeal in the District Court, Ramanathapuram, respondents 1 to 7 and 9 in the said appeal filed an application under Order 3, rule 4, Civil Procedure Code, to revoke the vakalat given by their power-of-attorney agent Muthuraja Thevar, to the Advocate now on record in the said appeal. The applicants in the lower Court as above are hereinafter referred to by me as principals. Muthuraja Thevar will be referred to as the agent. The principal under Exhibit A-1, dated 29th July, 1961, appointed an agent to be in-charge of their family litigation. Even by the time Exhibit A-1 was executed, the agent incurred certain expenses on behalf of the principals to conduct certain proceedings under section 145, Criminal Procedure Code, before the Revenue Divisional Officer. In consideration of such services in the past and to initiate further legal proceedings in connection with the family and its properties, the principals appointed the agent under a general power-of-attorney dated 29th July, 1961. A translation of the same is extracted as it would be necessary in the case:

" In view of the fact that we are unable to unitedly manage and improve the income of the said properties which is now insufficient for the family and to

* C. R. P. No. 809 of 1965. 22nd February, 1967.

conduct the litigation with reference to the said properties and set them right, we requested you to conduct our litigation and manage our propert es. We have accordingly given you this general power. In C C No. 3 of 1960, on the file of the Revenue Divisional Officer, which were section 145 proceedings, we were counter-petitioners. In the said proceedings you helped us and it went against us. It is urgent and necessary that civil proceedings have to be taken for setting aside that order. We have not got the necessary funds and do not know all the details. Besides conducting the said proceedings, in view of the fact that you need " உறுதி " for repaying to you the amount which you have hitherto spent for the said proceedings and for spending in future, we have executed this power. We have given you authority through this to act for us as plaintiff or defendant or petitioner or respondent, give vakalat and to conduct proceedings in civil, revenue and criminal Courts. You will incur the expenses therefor and in the matter of managing our family properties and clearing the encumbrances thereon you can do things according to your discretion without our permission. For the purpose of recouping yourself all the expenses, we authorise you to mortgage or sell our family properties."

I should immediately mention that there was some difference of opinion as to what exactly the word " உறுதி " connotes. Whereas the learned Counsel for the petitioner would state that it would mean security, the learned Counsel for the respondents would state that it would mean assurance. I shall presently refer to this in the course of my judgment.

The power-of-attorney was cancelled by the principals as they alleged that they lost confidence in their agent. It is also specifically alleged that the agent has not accounted for a sum of Rs. 700 which he has drawn from Court and which represented the costs of the suit originally instituted by the agent on behalf of the principals. The agent however took up the position that on a fair reading of the power-of-attorney subsisting in his favour, it is irrevocable as it should be deemed to be and is coupled with an interest within the meaning of section 202 of the Indian Contract Act.

The primary question argued before me is whether such an agency as contemplated in Exhibit A-1, which is the power-of-attorney is irrevocable.

Before I deal with the main question and probably the only question that was argued before me, I am satisfied that the principal has the right to have his Counsel to conduct his litigation, notwithstanding the fact that the agency in question is irrevocable or not The agent is engaged as a means to an end. He may have other rights under the power-of-attorney; but it appears to me that it would be a serious inroad on the liberty of a person if his agent were to dictate as to who should conduct the lit gation of his principal The agent in any circumstances cannot have the sole right to decide as to which Advocate has to be engaged for the princ pal's case. If the principal were thus to be constrained to continue his litigation through a Counsel not of his choice, not of his liking, it would tantamount to stifling the prosecution of a lawful suit and certainly therefore it will be against publ c policy. This decision of mine that the principal has the right to revoke a vakalat given by the agent in favour of the Advocate on record in the appeal under consideration is sufficient to dismiss the present Civil Revision Petition

But, as already stated, the question that was argued at length before me was that even if the principals had such right as above by virtue of the fact that Exhibit A-1 purports to give the agent an agency, which is irrevocable within the meaning of section 202 of the Indian Contract Act, the principal in such circumstances cannot revoke the vakalat given in favour of the Advocate appointed by the agent.

The agent has been appointed only to expend for the litigation to be and already sponsored by him and to have the right in the future to mortgage or sell the property of the principals for reimbursement of expenses incurred by him This in my opinion cannot create an interest in the subject-matter, which is the *sine qua non* to make the power an irrevocable one. If any such interest were to be created for

the benefit of the agent, it should be contemporaneously provided for in the instrument of agency itself and should not only be express but also be explicit It should not give any room for doubt, nor could it be a matter of interpretation. In my opinion, an agency to be irrevocable should therefore create in the agent an interest in the subject-matter contemporaneously with the document wherein such agency is created and it cannot be left to chance or guess or inference. Unless such a thing is available in the document itself, all such other powers given to the agent mainly for purpose of reimbursement of moneys spent by him for and on behalf of the principals, even if such reimbursement should be by way of mortgage or sale of the properties, would, in my opinion, create only a right incidental to such agency and would not amount to the creation of any interest in the agent over the subject-matter of the litigation or the subject concerned No doubt, an alleged irrational attempt on the part of the principals as in this case, to divest a right conferred on the agent incidentally for the purpose of reimbursement may give rise to a cause of action to the agent to sue the principals for damages and safeguard and secure his right of recoupment by setting the process of law into motion expeditiously. But this is entirely a different legal incident which has no bearing on the issue whether Exhibit A-1, the power-of-attorney is by itself an irrevocable power within the meaning of section 202 of the Indian Contract Act on the ground that it is coupled with interest.

Bowstead in his book on 'Agency' 12th Edition has stated the formula in such cases in these terms:

"Where the authority of an agent is given by deed or for valuable consideration for the purpose of effectuating any security or of protecting or securing any interest of the agent, it is irrevocable during the subsistence of such security or interest. But it is irrevocable merely because he has an interest in the exercise of it or has a special property in, or lieu for advances upon, the subject-matter thereof. ..."

Section 202 of the Indian Contract Act itself runs in these terms:

"Where the agent has himself an interest in the property which forms the subject-matter of the agency the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest."

Even on a reading of the section it cannot be said that in the instant case the agent has an interest in the subject-matter of the agency. My attention was drawn to a decision of Venkatasubba Rao, J., in *Venkanna* v. *Achutaramanna*[1], where the learned Judge says that:

"The principle of section 202 applies only to cases where authority is given for the purpose of being a security or a part of the security and not to cases where the interest of the donee arises afterwards and *incidentally*; in such cases, there is no authority coupled with an interest, but an independent authority and an interest subsequently arising." (the italics is mine).

Even so, a Division Bench of our High Court in *Palanivannan* v. *Krishnaswami Konar*[2] laid down the test to be applied in such cases. The power in that case was also on very similar lines with the power which is scrutinised by me. While reviewing such a document, the learned Judges observed:

"My view of the document is as follows: I think its primary object was to recover on behalf of the principal the fruits of his decree. It contained incidentally a proviso for the enjoyment of the agent, Vedavyasachar, in order to realise that decree. It provides that his remuneration is to be one-half of the proceeds. It contains an indemnity clause against any out of pocket expenses which he is entitled also to recover from the amount of the decree But the object of the power-of-attorney is not for the purpose of protecting or securing any interest of the agent. I think that part of the agreement is purely incidental".

1. (1938) 1 M.L.J. 610: A.I.R. 1938 Mad. 542.
2. (1945) 2 M.L.J 303: I.L.R. (1946) Mad. 121: A.I.R. 1946 Mad. 9.

In the present case, the power-of-attorney incidentally provides for an assurance that the agent can have recourse to the properties of the principals for advances made by him. The word, " உறுதி " in my opinion, having regard to the circumstances of this case, would rather mean " assurance " and cannot be equated to the expression "security". Therefore, the recitals in Exhibit A-1 do not in my opinion create an irrevocable agency in the agent entitling him to object to the relief asked for by the principals in the lower Courts. What Exhibit A-1 provides for is only the mode as to how the agent can realise his dues. No security is in fact created upon the execution of the instrument. No interest therefore is coupled with the agency.

In the view that I hold, the order of the lower Court is well founded. The Civil Revision Petition therefore fails and is dismissed, but, in the circumstances there will be no order as to costs.

V. M. K. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE, P. RAMAKRISHNAN

Madrasai Nusrathul Islam Trust, by Managing Trustee M.A.Md Ismail . *Petitioner**

v.

The State of Madras, represented by the Accommodation Controller, Madras . *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), sections 3 (5), second proviso and 22 and rule 6—Interpretation—Government deemed tenant of the landlord from the date fixed by the Accommodation Controller in case of obstructive or preventive tactics or omission on the part of the landlord—Absence of wilful of deliberate act or omission on the part of the landlord to repair—Second proviso, if could be invoked.

Section 3 (1) (*d*) of the Madras Buildings (Lease and Rent Control) Act (Madras Act XVIII of 1960) makes it obligatory that every landlord shall, within 7 days after the building becomes vacant, by the termination of tenancy, give notice of the vacancy in writing to the Officer authorised in that behalf by the Government (Accommodation Controller in this case). The second proviso to section 3 (5) of the Act *inter alia* provides that provided further that where owing to any omission or act or obstructive or preventive tactics on the part of the landlord there has been delay in coming to a decision whether or not the building is required for any of the purposes, or for occupation by any of the officers specified in sub-section (3), the Government shall be deemed to be the tenant of the landlord only from such later date as may be fixed by the authorised officer having regard to the circumstances of each case.

Could this proviso be invoked to a case where there is no wilful omission or deliberately obstructive or preventive tactics on the part of the landlord, but the necessity for repairs has arisen in the usual course, either due to the default of the previous tenant or some other similar causes?

Held, that interpreting the words " omission or act or obstructive or preventive tactics " on the part of the landlord *ejusdem generis* the second proviso to section 3 (5) of the Act implies an element of penalty, which requires the penalising of the landlord for obstructive or preventive tactics, which contributed to the delay on the part of the Accommodation Controller, in coming to a decision. It is not in every case, where repairs are required according to the view of the Accom-

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*W P No. 384 of 1965 26th September, 1967.

modation Controller, that the power of extension contemplated in the proviso can be invoked Section 22, at the same time, providing for effecting of such repairs, places an upper limit for such compulsory repairs, namely, it shall not in any one year exceed one-twelfth of the rent payable in respect of the building for that year. Rule 6 of the rules framed under the Act providing for inspection of the vacant buildings by prospective allottees also leads to the conclusion that the second proviso can be applied only to select cases where there is clear proof of deliberate omission amounting to obstructive or preventive tactics and positive acts of obstruction or prevention on the part of the landlord

Petition under Article 226 of the Constitution praying the High Court to call for records of respondent in A.2-21024/63 dated 18th January, 1965, and issue a writ of *mandamus* directing the respondent to forbear from proceeding further with his action under Act XVIII of 1960, etc.

K. N. Balasubramaniam, for Petitioner.

J. Kanakaraj, for Government Pleader, for Respondent

The Court made the following

ORDER —In this writ petition, the necessity has arisen to interpret the provisions of section 3 of the Madras Buildings (Lease and Rent Control) Act, 1960, in regard to a part of it, introduced for the first time in 1960, and for whose interpretation there is no clear authority The circumstances have arisen in the following way.

The petitioner is a trust, and premises No 12, Muthucattan Street, Periamet, Madras, belongs to the trust. The last tenant of the premises was one Gaughan, who vacated it on 12th August, 1963 Section 3 (1) (*a*), of the Madras Buildings (Lease and Rent Control) Act (Madras Act XVIII of 1960) hereinafter called the Act, makes it obligatory that every landlord shall, within 7 days after the building becomes vacant, by the termination of tenancy, give notice of the vacancy in writing to the officer authorised in that behalf by the Government, which, in this case, is the Accommodation Controller, the respondent herein Admittedly, the petitioner gave his report of vacancy on 14th August, 1963. On 19th August, 1963, the Accommodation Controller called for some particulars, and which also the petitioners supplied on 21st August, 1963 On 22nd August, 1963, the Accommodation Controller intimated to the petitioner, that an Inspector would inspect the premises, and the Inspector visited the premises, on 22nd August, 1963, and made a report that the roof of the kitchen and the passage had collapsed Thereupon, the Accommodation Controller wrote a letter on 22nd August, 1963, to the petitioner saying :

"It is reported by the Accommodation Inspector of this office that the roof of the kitchen and the passage of the above premises have collapsed I, therefore, request you to intimate the vacancy after restoring the building to its original tenantable condition Please note that the period of seven days for which you have to await the Accommodation Controller's orders regarding the disposal of the house will commence only from the date on which his report with the above action is received Till then you should neither occupy the premises nor let out the same to any person."

The petitioner trust replied to this letter stating that they were not prepared to spend any amount on the repairs for the building and requested that the premises might be released to it for its occupation. In a communication dated 28th August, 1963, this request was turned down by the Accommodation Controller, and the petitioner was told that if he failed to intimate the vacancy (afresh) after bringing the premises to a tenantable condition action would be taken to prosecute him for non-intimation of vacancy Subsequently on 18th June, 1964, the Accommodation Controller gave notice to the petitioner that he had allowed one Hameed to occupy the building and that it had not intimated the vacancy as required

in his communication dated 26th August, 1963, after repairing the premises, and asked it to show cause against prosecution. Another final notice to the same purport was issued on 18th January, 1965 to the petitioner. The petitioner filed thereafter this writ petition under Article 226 of the Constitution praying for the issue of a writ of *mandamus* restraining the respondent from proceeding further in pursuance of this final notice dated 18th January, 1965, for prosecuting the petitioner for not intimating the vacancy after repairing the premises, as required in the letters above mentioned, sent by the Accommodation Controller to the petitioner.

In the counter-affidavit as well as at the time of the hearing of the writ petition, the learned Government Pleader, appearing for the respondent-Accommodation Controller, has sought reliance on the second proviso to section 3 (5) of the Act, which is in the following terms :

> " Provided further that where owing to any omission or act or obstructive or preventive tactics on the part of the landlord there has been delay in coming to a decision whether or not the building is required for any of the purposes, or for occupation by any of the officers specified in sub-section (3), the Government shall be deemed to be the tenant of the landlord only from such later date as may be fixed by the authorised officer having regard to the circumstances of each case."

The counter-affidavit stated that by keeping the building in untenantable condition at the time of giving the notice of the vacancy, the landlord had made it impossible for the Accommodation Controller to decide whether the building was required for any of the purpose mentioned in section 3 (3) of the Act. It was in the above circumstances that the Accommodation Controller had required that the landlord should give a fresh intimation of vacancy after making the building tenantable.

On the question of putting into a tenantable condition a building, regarding which a report of vacancy had been given by the landlord under the provisions of section 3 (1) (*a*) of the Act, it has to be pointed out that section 3 (5) and 22 of the Act, contain certain provisions. Section 3 (5) states, that, if the building is required for any of the purposes, or for occupation by any of the officers specified in sub-section (3), the landlord shall deliver possession of the building and the fixtures and fittings in or on the buildings, in good tenantable repairs and condition to the authorised officer, and thereupon the Government shall be deemed to be the tenant of the landlord, with retrospective effect from the date on which the authorised officer received notice under sub-section (1) or sub-section (2). Thereafter the terms of the fresh tenancy will be such as may be agreed upon between the landlord and the tenant, and in default of an agreement, as may be determined by the Controller. Section 22 (*a*) of the Act states that, if a landlord fails to make necessary repairs to the building within a reasonable time after notice is given by the authorised officer in the case of a building in respect of which the Government shall be deemed to be the tenant under sub-section (5) of section 3, the authorised officer may make such repairs or have them made by the allottee and deduct the cost thereof from the rent payable for the building or ask the allottee to make such a deduction from the rent payable. There is, therefore, a clear provision for dealing with a case where the building, regarding which a report is made under section 3 (1) of the Act, is found to require repairs, in which case either of the two remedies provided in section 22 can be adopted. But in such a case, section 3 (5) does not empower the Accommodation Controller to postpone making his decision about allotting the house to an officer or an institution or authority under the control of the Government.

The respondent's Counsel, however, relied on the second proviso to section 3 (5) above extracted as an authority, for justifying postponement of a decision about allotment, till such time as the building is put into a tenantable condition. The language of the proviso shows that it refers to certain circumstances where the Accommodation Controller need not come to a decision about allotment within 7 days prescribed in section 3 (3) but can postpone coming to the decision in that respect.

The question for consideration is what exactly is the situation thus visualised The first part of this proviso refers to "omission or act or obstructive or preventive tactics" on the part of the landlord leading to delay in coming to a decision, as to whether or not the building is required for any of the purposes or for occupation by any of the officers specified in sub-section (3). Clearly the first part of the proviso visualises only a limited situation, where the Accommodation Controller is empowered in certain circumstances to postpone the taking of decision and communicating that decision, beyond the period of seven days mentioned in sub-section (3) of section 3.

The question for consideration is whether a case like the present one, where the building is found to require some repairs and which the Accommodation Controller considers it necessary for the landlord to carry out, can be construed as a proper ground for postponing coming to a decision about allotting the premises under the second proviso to section 3 (5). It appears to me that it is not in every case, where repairs are required according to the view of the Accommodation Controller, that the power of extension contemplated in the proviso can be invoked. If that were the view to be taken of the proviso, it would impose in many cases an oppressive burden on the landlord who will have to comply with the terms of the Accommodation Controller for repairing the building irrespective of cost or time. On the other hand, section 22, providing for effecting of such repairs, places an upper limit for such compulsory repairs, namely, it shall not in any one year exceed one-twelfth of the rent payable in respect of the building for that year. This would also show that the second proviso to section 3 (5) is intended to deal only with a limited set of circumstances. To construe what circumstances are meant by the proviso, it appears reasonable to take the words "omission or act or obstructive or preventive tactics" on the part of the landlord *ejusdem generis* ; in other words what the proviso implies is an element of penalty, which requires the penalising of the landlord for obstructive or preventive tactics, which contributed to the delay on the part of the Accommodation Controller, in coming to a decision.

In this connection, reference can be made to the rules framed under the Act, Rule 6 provides for inspection of vacant buildings by prospective allottees The landlord at times may deliberately fail to give the key of the building, to enable the prospective allottee to have inspection of the building, and that will be an act of omission on the part of the landlord within the meaning of the proviso, and the Accommodation Controller can take this as ground for extending the period for coming to a conclusion. Such omission can be construed as obstructive or preventive tactics on the part of the landlord. But where it is found that part of the building requires some repairs and there is no evidence of the necessity for repairs having arisen through a deliberate omission or obstructive or preventive tactics on the part of the landlord, there will be no scope for invoking the principles stated in the second proviso to section 3 (5) of the Act. In such cases, the ordinary rule of allowing the new tenant or officer to occupy the premises subject to the condition of further steps being taken under section 22 of the Act to effect repairs, should be resorted to. This appears to be the most reasonable way of giving a harmonious construction to the provisions of the section (section 3 of the Act) including the second proviso which is now before me for consideration as well as section 22 of the Act.

Learned Counsel for the petitioner states that the second proviso should be limited to the purposes mentioned in the latter part of the proviso namely " deeming the Government to be the tenant of the landlord only from such later date as may be fixed by the authorised officer having regard to the circumstances of each case " and that proviso cannot be used to cover a delay in making a decision about the allotment and, consequently extending the period of 7 days for communicating that decision, as required under section 3 (3) of the Act. If this view of the proviso is to be taken, it will ignore the first part of the proviso, which refers to delay in coming to a decision about the requirement of the building (by the Accommodation Controller) owing the obstructive or preventive tactics adopted by the landlord

What I have stated above shows that the second proviso can be applied only to select cases, where there is clear proof of deliberate omission amounting to obstructive or preventive tactics and positive acts of obstruction or prevention on the part of the landlord, and it cannot be applied to a case where there is no wilful omission or deliberately obstructive or preventive tactics on the part of the landlord, but the necessity for repairs has arisen in the usual course, either due to the default of the previous tenant or some other similar causes. In the present case, the finding of the Accommodation Controller is that the building requires some repairs in respect of kitchen roof and passage. But there is no finding and no suggestion that these repairs have been necessitated by any deliberate omission or obstructive or preventive tactics on the part of the landlord. Consequently, in the view I have taken of the proviso there is no scope for invoking its application to the circumstances of the present case.

The writ petition is allowed. A writ of *mandamus* will issue restraining the Accommodation Controller from proceeding further with the proposal to prosecute the petitioner for non-compliance with the direction mentioned in the notice dated 18th January, 1965. There will be no order as to costs.

V.M.K. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT :—MR. JUSTICE P. S. KAILASAM.

M. Gopal Gounder .. *Petitioner**

v.

The Panchayat Board, Manalurpet, by its President and another .. *Respondents.*

Madras Panchayats Act (XXXV of 1958), sections 26 (d) and 28—Removal of the member—If could be effected by the resolution of the Panchayat Board.

On the question whether it is open to the Panchayat Board to remove the member (petitioner) from membership by passing a resolution to that effect on the basis of the memo. sent by the Panchayat Extension Officer complaining that the Panchayat had not taken action and removed the member from membership who has been disqualified,

Held, that there is no authority vested in the Panchayat by the Act or by the Rules empowering it to remove a member. If there is a dispute as to whether a member has become disqualified or not the only procedure to be followed for removing him is under section 28, *i.e*, by applying to the prescribed judicial authority whose decision shall be final.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records connected with the resolution of the first respondent, dated 31st August, 1965, directing the removal of the petitioner from the membership and quash the said resolution.

R. Sundaravaradan, for Petitioner.

C. Vasudevan, for 1st Respondent.

The Court made the following

ORDER.—This petition is filed by a member of Manalurpet Panchayat praying for the issue of a writ of *certiorari* calling for the records connected with the resolution of the Panchayat Board, Manalurpet, dated 31st August, 1965, directing the petitioner to be removed and to quash the order.

The petitioner was elected as a member of the panchayat on 8th April, 1965. On 19th August, 1965, the Panchayat Extension Officer, Mugaiayoor Panchayat

*W. P. No. 1253 of 1966. 27th September, 1966.

Union, having jurisdiction over the first respondent Panchayat Board, wrote to the President of the Manalurpet Panchayat stating that the petitioner is not qualified to be a member of the panchayat under section 26 (*d*) of the Panchayats Act (XXXV of 1958) and called upon the Panchayat to explain why no action was taken to remove the petitioner from the membership of the Panchayat Appropriate action was threatened in case the Panchayat did not take steps to remove the petitioner from the membership of the Panchayat. In pursuance of the letter of the Panchayat Extension Officer, dated 19th August, 1965, on 25th August, 1965, the President of the Panchayat issued a notice to the petitioner. The petitioner on 31st August, 1965 objected to the proposed removal disputing that he was disqualified to be a member and pointing out that the Panchayat had no jurisdiction to remove him from membership On 1st September, 1965 the Panchayat met and passed a resolution endorsed the memo. of the Panchayat Extension Officer, dated 19th August, 1965 and removed the petitioner from his membership of the Panchayat by a majority of 6 to 5. This resolution is impugned as illegal and unsustainable in law as being beyond the powers of the Panchayat.

Section 17 of the Panchayats Act prescribes that the term of office of the members of every Panchayat who are elected at the ordinary elections shall, save as otherwise expressly provided in or may be prescribed under this Act, be five years. Sections 25 and 26 relate to disqualifications of candidates and disqualifications of members Section 25 (1) and section 25 (2) provide that a person shall be disqualified for election, as a member if, at the date of nomination or election, he suffers from any of the disqualifications mentioned in section 25 (1) and (2), clauses (*a*) to (*g*). Section 26 provides that subject to the provisions of section 28, a member shall cease to hold office if he incurs any of the disabilities mentioned in section 26, clauses (*a*) to (*j*). The provision that he ceases to hold office under section 26 is subject to the provisions of section 28 Section 28 provides that whenever it is alleged that any person who has been elected as a member of a Panchayat is not qualified or has become disqualified under sections 22, 24, 25 or 26 and such person does not admit the allegation, such member or any other member may, and the Executive Authority or the Commissioner as the case may be shall, on the direction of the Panchayat or Panchayat Union Council or of the Inspector, apply to the prescribed judicial authority whose decision shall be final Thus it will be seen that if there is an allegation that a person who has been elected as a member of the Panchyat has become disqualified, the member concerned or any other member may and the authorities mentioned shall, on the direction of the Panchayat, apply to the judicial authority for decision on the question. In this case, as already pointed out, the petitioner does not admit his disqualification, and the procedure therefore, is that any member aggrieved should approach the judicial authority for decision after fulfilling the conditions laid down under section 28. That has not been admittedly done in this case

What has happened in this case is that on the memo. sent by the Panchayat Extension Officer complaining that the Panchayat had not taken action and removed the member from membership who has been disqualified, the Panchayat passed a resolution removing him There is no authority vested in the Panchayat by the Act or by the Rules empowering it to remove a member If there is a dispute as to whether a member has become disqualified or not the only procedure to be followed for removing him is under section 28 The resolution of the Panchayat removing the petitioner is, therefore, beyond the powers conferred on the Panchayat under the Madras Panchayats Act. The resolution has to be quashed and is hereby quashed The subsequent resolution by the Panchayat calling for fresh elections for the seat alleged to have been vacated by the petitioner will also be quashed.

The writ petition is allowed. There will be no order as to costs.

V M K. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. M ISMAIL.

Syed Ibrahim and others .. *Appellants**

v.

Jalma and others . *Respondents.*

Madras City Tenants Protection Act, (III of 1922), sections 2 (4), 3 and 9 (1) (a)—Scope, applicability and construction of—Ejectment suit—Defendant (tenant) not filing application under section 9 (1) within time stipulated—Death of defendant pending suit—Legal representatives brought on record—Right of legal representatives—Competency to file application under section 9 (1)—Legal representatives cannot claim fresh opportunity or right to prefer application—No independent right

Words and Phrases—" To institute "—Interpretation of.

Limitation Act (XXXVI of 1963), section 21 (1)—Scope of.

For the purpose of a person coming within the scope of section 9 (1) (*a*), of Madras City Tenants Protection Act the following conditions must be fulfilled; (1) he must be a tenant as defined in the Act; (2) he must be entitled to compensation under section 3 of the Act; (3) against that person, a suit in ejectment should have been instituted; (4) within one month after the service on him of summons, he must apply to the Court for an order that the landlord shall be directed to sell for a price to be fixed by the Court the whole or part of the extent of land; and (5) the land must be specified in the said application preferred by him. Unless all these conditions are cumulatively satisfied, the person cannot come within the scope of the Act

No doubt, the Act recognises the heirs of a tenant as tenants for the purpose of the Act That will mean that if the original tenant is dead and the heirs continue in possession, they will be entitled to all the protection which the Act has conferred on a tenant, because they themselves are treated as tenants. For instance, if, after the death of the original tenant, a suit in ejectment is filed against his heirs, they will be entitled to be paid compensation under section 3 of the Act, and they will be entitled to apply under section 9 (1) of the Act. But, when the suit has been instituted against a tenant and during the pendency of the suit his legal representatives are brought on record, it cannot be said that they are brought on record only in their own right as statutory tenants recognised by the Act and not as heirs to the right, title and interest of the deceased tenant Consequently, the right of the first defendant to apply under section 9 (1) of the Act, having been lost by his failure to prefer an application within the time stipulated by the section, defendants 2 to 7 who succeeded to his rights and interest cannot claim a fresh opportunity or right to prefer an application under section 9 (1) of the Act. In that view, it was held that defendants 2 to 7 did not have any independent right to file an application under section 9 (1) of the Act, after they were brought on record as parties to the suit on the death of their father

A person to come within the scope of section 9 of the Act must be a person against whom a suit in ejectment has been instituted. The expression "to institute" has got a definite connotation in law; and, in relation to any proceeding, there can be only one institution and that is when the machinery is set in motion and proceedings are instituted or initiated That is why section 21 (1) of the Limitation Act, 1963 provides that the suit will be deemed to have been instituted on the date when legal representatives had been made parties to the suit. As far as defendants 2 to 7 are concerned, it cannot be said that the suit has been instituted against them All that can be said is that they are parties to a pending suit which was originally against the first defendant

The right conferred on a tenant under section 9 of the Act constitutes a serious inroad into the fundamental right of the landlord to hold his own property and

*S A No 1875 of 1964, A A O No 302 of 1964 and C R P Nos 876 and 877 of 1965 — 19th February, 1968

he is compelled to sell the property againt his volition In such circumstances unless the person comes within the four corners of the language of the section, there is no justification for extending the right or the benefit conferred on a tenant by that section to a person who does not strictly fall within the scope of the section.

Appeals against the Decree of the Court of the Second Additional Subordinate Judge, Madurai, in Appeal Suit No. 157 of 1963 preferred against the Decree of the Court of the Principal District Munsif of Madurai Town in Original Suit No. 81 of 1961. etc.

K. S. Desikan, for Appellants.

T. R. Mani, for Respondents.

The Court delivered the following

JUDGMENT :—The appellants in the above Second Appeal and the Civil Miscellaneous Appeal and the petitioners in the Civil Revision Petitions are the same. Appellants 1 to 3 are the assignees of the fourth appellant (fourth petitioner in the Civil Revision Petitions), who instituted O S. No. 81 of 1961 on the file of the Court of the Principal District Munsiff, Madurai Town, for directing Kader Mohideen Rowther (first defendant) to vacate and put the plaintiff in possession of the suit site after removing the superstructure thereon put up by the first defendant and for directing the first defendant to pay the plaintiff a sum of Rs. 276, the rent arrears for four months and twelve days. The plaint was presented on 18th February, 1961. Summons in the suit were served on the first defendant on 14th March, 1961. On 20th April, 1961, the first defendant filed his written statement. Subsequent to the filing of the written statement, the first defendant died on 17th September, 1961. Thereafter, defendants 2 to 7 were brought on record as the legal representatives of the deceased first defendant, as per order of Court dated 13th October, 1961, in I.A. No. 1669 of 1961. On 3rd November, 1961, defendants 2, 4, 5 and 7 filed O.P. No 87 of 1961, under section 9 of the Madras City Tenants' Protection Act, 1921. On the same day, the third defendant filed O P. No 88 of 1961 for the same relief. The learned District Munsif considered all the three proceedings together and, by his judgment and decree dated 14th February, 1963, allowed O.P. Nos. 87 and 88 of 1961, dismissed the suit for possession filed by the plaintiff, and directed the sale of the suit site in favour of the petitioners in O.P. Nos. 87 and 88 of 1961 fixing the value of the suit site at Rs. 23,700 and granting one year's time for payment of the said amount. In the meanwhile, it appears that the original plaintiff assigned his interest in the suit site in favour of three persons, and therefore he along with the said three persons preferred A.S. Nos. 157, 158 and 159 of 1963 on the file of the Court of the Subordinate Judge of Madurai, against the decree and orders passed in O.S. No 81 of 1961 and O.P. Nos. 87 and 88 of 1961. The learned Subordinate Judge, by his judgment and order dated 31st January, 1964, remanded the suit to the lower Court. He agreed with the conclusion of the trial Court that defendants 2, 3, 4, 5 and 7 were entitled to apply under section 9 of the Act but held that the minimum extent of the land which may be necessary for the convenient enjoyment by them has not been properly determined. He also observed that the suit of the plaintiff for possession should not have been dismissed in the first instance itself, before the petitioners in the original petitions were given an opportunity to pay the price and purchase the property. In this view, he remanded the proceedings to the lower Court, for the purpose of deciding the question in relation to the minimum extent that would be necessary for the convenient enjoyment by the petitioners in the Original Petitions. It is againt the judgment of the learned Subordinate Judge in A.S No 157 of 1963 in O.S. No. 81 of 1961 that S.A. No. 1875 of 1964 and C M.A. No 302 of 1964 have been preferred. C.R.Ps. Nos. 876 and 877 of 1965 have been preferred against the orders of the learned Subordinate Judge in A.S. No. 158 of 1963 in O.P. No. 87 of 1961 be and A.S. No. 159 of 1963 in O.P. No. 88 of 1961 respectively.

The principal question that has to be considered is whether the applications filed by the legal representatives of the original first defendant under section 9 of the Act were competent. If they were competent, no interference would be called for in the Second Appeal and the Civil Miscellaneous Appeal. On the other hand, if the applications were not competent the Civil Revision Petitions will have to be allowed, and the Civil Miscellaneous Appeal and the Second Appeal also will have to be allowed.

Mr. K. S. Desikan, the learned Counsel for the appellants, contended that on the facts set out above, the original tenant of the property, namely, the first defendant did not exercise his right under section 9 of the Madras City Tenants' Protection Act within the time prescribed by law and therefore he lost his right: Once the first defendant had lost his right, defendants 2 to 7, who only stand in the shoes of the first defendant and who have inherited the rights which the first defendant had on the date of his death, could not have filed the applications under section 9 of the Act within 30 days from the date on which they were brought on record as parties to the suit. For this purpoe, Mr Desikan drew my attention to the language employed in section 9 of the Act and also the provisions contained in Order 22 of the Code of Civil Procedure and section 21 of the Limitation Act, 1963. On the other hand Mr. T. R. Mani, the learned Counsel for the respondents, contends that defendants 2 to 7 have been recognised as tenants by the Act in their own right and they are entitled to all the benefits, rights and protection conferred by the Act, and one of the rights being the right to apply for the sale of the property under section 9 of the Act, they were entitled to apply under section 9 within thirty days from the date when they were made parties to the suit.

Before I examine the rival contentions advanced before me in detail, it is necessary to refer to the relevant statutory provisions. Section 2 (4) of the Madras City Tenants' Protection Act defines the word ' tenant ' as follows :—

" ' Tenant ' in relation to any land—

(i) means a person liable to pay rent in respect of such land, under a tenancy agreement express or implied, and

(ii) includes—

(a) any such person as is referred to in sub-clause (i) who continues in possession of the land after the determination of the tenancy agreement, and

(b) the heirs of any such person as is referred to in sub-clause (i) or sub-clause (ii) (a): but does not include a sub-tenant or his heirs."

Section 3 states that every tenant shall on ejectment be entitled to be paid as compensation the value of any building, which may have been erected by him, by any of his predecessors-in-interest, or by any person not in occupation at the time of the ejectment who derived title from either of them, and for which compensation has not already been paid. Section 9 (1) (a) of the Act, so far as is relevant for the present case, is in the following terms:

" Any tenant who is entitled to compensation under section 3 and against whom a suit in ejectment has been instituted or proceeding under section 41 of the Presidency Small Cause Courts Act, 1882, taken by the landlord, may... ...... within one month after the service on him of summons, apply to the Court for an order that the landlord shall be directed to sell for a price to be fixed by the Court, the whole or part of, the extent of land specified in the application."

For the purpose of a person coming within the scope of section 9 (1) (a), the following conditions must be fulfilled:—

(1) He must be a tenant as defined in the Act;

(2) He must be entitled to compensation under section 3 of the Act;

(3) Against that person, a suit in ejectment should have been instituted;

(4) Within one month after the service on him of summons, he must apply to the Court for an order that the landlord shall be directed to sell for a price to be fixed by the Court, the whole or part of the extent of land; and

(5) The land must be specified in the said application preferred by him.

Unless all these conditions are cumulatively satisfied, the person cannot come within the scope of the Act. The argument of Mr. Desikan is that one of the conditions of this section is that he must be a person against whom a suit in ejectment has been instituted, and as far as the present case is concerned the suit in ejectment was instituted only against the first defendant and such a suit in ejectment was not instituted against defendants 2 to 7. In this context, Mr. Desikan relies on the provisions contained in Order 22, rules 3 and 4 of the Civil Procedure Code, wherein it is provided that after the legal representatives of the deceased plaintiff or the deceased defendant have been made parties, the suit shall be *proceeded* with. According to him, these rules make a distinction between the institution of the suit and the suit already instituted being proceeded with. Consequently, what happens after the legal representatives have been brought on record is not that the suit is instituted by them or against them but that the suit already instituted is proceeded with by them or against them. He also relies on Order 22, rule 4 (2) which provides that any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant, and contends that to defendants 2 to 7 only such defences as would be appropriate to them in their character as legal representatives would be available and if any defence open to the first defendant was lost, defendants 2 to 7 cannot revive such a defence and put forward the same. In this context, reference has been made to section 21 of the Indian Limitation Act, 1963, which, so far as is relevant for the present case, is in the following terms:

"(1) Where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.' ... ...

(2) Nothing in sub-section (1) shall apply to a case where a party is added or substituted owing to assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff."

Based on this, Mr. Desikan argues that, as far as the present case is concerned, there had been only one institution of suit against the first defendant and that when defendants 2 to 7 were brought on record, it could not be said that there had been institution of the suit against them at the subsequent stage when they were brought on record. Mr. K. S. Desikan further invited my attention to the decisions of this Court in *Nagammal* v. *Govindarajulu Naicker*[1], and *Srinivasan* v. *Khader Mohideen Rowther*[2], to the effect that the period of limitation of 30 days provided in section 9 (1) (*a*) of the Act cannot be extended.

Mr. T. R. Mani, on the other hand, contends that the definition of the word 'tenant' in section 2 (4) of the Madras City Tenants' Protection Act expressly includes the heirs of the tenant and consequently defendants 2 to 7 are tenants in their own right entitled to all the protections given by the Act. According to the learned Counsel, when defendants 2 to 7 were brought on record as parties to the suit, they did not come on record as representatives of their father or did not derive their right or title from their father but in their own independent right as being persons entitled to the rights conferred by the Act. In that view, the case of defendants 2 to 7 did not fall within the scope of Order 22, rule 4 of the Civil Procedure Code but fell under Order 22, rule 10 of the same Code, and consequently the provisions contained in section 21 (1) of the Limitation Act already referred to alone will apply.

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1. (1958) 1 M.L.J. 286. 2. (1964) 1 M.L.J. 323.

I am of the view that the contention of the learned Counsel for the respondents proceeds on a misapprehension. No doubt, the Act recognises the heirs of a tenant as tenants for the purpose of the Act. That will mean that if the original tenant is dead and the heirs continue in possession, they will be entitled to all the protection which the Act has conferred on a tenant, because they themselves are treated as tenants. For instance, if, after the death of the original tenant, a suit in ejectment is filed against his heirs, they will be entitled to be paid compensation under section 3 of the Act, and they will be entitled to apply under section 9 (1) of the Act. But the question is, when the suit has been instituted against a tenant and during the pendency of the suit his legal representatives are brought on record, can it be said that they come on record not because they happen to be the legal representatives of the original tenant but because in their own right, they themselves are tenants? I am unable to hold that, when they are brought on record as legal representatives, they are brought on record only in their own right as statutory tenants recognised by the Act and not as heirs to the right, title and interest of the deceased tenant. Consequently, the right of the first defendant to apply under section 9 (1) of the Act, having been lost by his failure to prefer an application within the time stipulated by the section, defendants 2 to 7 who succeeded to his rights and interest cannot claim a fresh opportunity or right to prefer an application under section 9 (1) of the Act This view of mine finds support from the decision of Ganapatia Pillai, J., in C.R.P. No. 2408 of 1961, where the learned Judge has stated as follows:

"The necessity for defining a tenant in the Act as including the legal representative would be obvious if we analyse the nature of the right conferred upon the tenant by the enactment. Under the general law, no tenant had a right to compel his landlord to sell a land upon which the tenant builds a superstructure. When such a new right was being conferred upon the tenant, it was obvious to the Legislature that the term tenant by itself was not enough to include his legal representative. The whole body of persons proposed to be called tenants by reason of inheritance would be left out of the purview of the Act. That was why the definition of 'tenant' in the enactment had to be so worded as to include a legal representative. This does not lead to the conclusion that a legal representative of a tenant against whom a decree for eviction had been made obtains an independent right to apply under section 9 (1) apart from the bundle of rights that he inherited from his ancestor. If the ancestor had the right, and he died without exercising it within the time allowed by section 9 (1), certainly, the legal representative could exercise it; but if the ancestor himself had lost the right either by efflux of time or for any other reason, I am unable to find any ground for concluding that a new right is conferred by section 9 (1) upon the tenant who is merely the legal representative of the tenant against whom a decree for eviction had been made The true legal basis for the rights of a legal representative is that he steps into the shoes of his ancestor and inherits what his ancestor left as his estate. The estate left by the ancestor in this case included no doubt the tenancy of the land in question, but attached to that right of tenancy of the land was the inchoate right to apply for purchasing the landlord's interest under section 9 (1). That right would become a completed right only when an application is made under section 9 (1) within the time prescribed by law. Once the ancestor failed to apply under section 9 (1) that right must be deemed to have been lost as the inchoate right lapsed with the expiry of the period within which that right should be exercised In this view of the rights of legal representatives, it would not be correct to hold that a legal representative like the present petitioners would get an independent right to apply under section 9 (1), apart from possession of any such right on a part of the estate which they have inherited from their ancestor"

I have quoted from that judgment in such *extenso*, because, if I may say so with respect, that represents the correct position in law. Though the learned Judge

was dealing with a case where a decree had been passed and at the stage of execution the legal representatives sought to file an application under section 9 (1), still the learned Judge himself pointed out that whether a decree had been passed or not, it would not make any difference in the legal position. The learned Judge proceeded to observe.

> "Let me take an example where no decree had been obtained and the suit for eviction was pending Only one chance is given in that contingency to a defendant to apply under section 9 (1) and that is within one month of the service of summons in the proceeding upon him. If that opportunity is not availed of, no further opportunity is given to the tenant to apply under section 9 (1) even if ultimately the decree passed is set aside and a fresh trial is ordered."

In my view, this will be sufficient to hold that defendants 2 to 7 did not have an independent right to file an application under section 9 (1) of the Act, after they were brought on record as parties to the suit on the death of their father.

There is one other ground on which also it can be held that defendants 2 to 7 are not entitled to file an application under section 9 (1) of the Madras City Tenants Protection Act. I have already pointed out that a person to come within the scope of section 9 of the Act must be a person against whom a suit in ejectment has been instituted. The expression 'to institute' has got a definite connotation in law, and, in relation to any proceeding, there can be only one institution and that is when the machinery is set in motion and proceedings are instituted or initiated That is why section 21 (1) of the Limitation Act, 1963, provides that the *suit will be deemed to have been instituted* on the date when legal representatives had been made parties to the suit. As far as defendants 2 to 7 are concerned, it cannot be said that the suit has been instituted against them. All that can be said is that they are parties to a pending suit which was instituted originally against the first defendant.

Mr. T. R. Mani contends that the expression 'has been instituted' should be liberally construed and, for this purpose, relies upon a Full Bench decision of this Court in *Syed Oomer Sahib* v. *Gopaul*[1]. In that decision, it was held that section 9 of the Act applies to a case where the suit in ejectment has resulted in judgment but has not been executed or completed by the process of ejectment In my view, that decision is not of any help to the respondents. A person will be a person against whom a suit has been instituted, at any stage of the proceedings, whether the suit has resulted in a decree or not, so long as he is the person against whom a suit was filed. The Full Bench observed :

> "The sole question is whether at the time the Act came into force the defendant can be described as a tenant against whom a suit in ejectment has been instituted. It is not contended that those words can bear the extreme meaning that any tenant against whom a suit in ejectment had even been instituted—a suit which might have been brought to a completion by execution and ejectment—is within these words of section 9 ; but it is contended that it applies to a case where the suit in ejectment has resulted in judgment but has not been executed or completed by the process of ejectment It seems to me that that contention is right and that the tenant intended by the section is a person who is threatened with ejectment as the result of legal proceedings instituted against him but has not in pursuance of those proceedings been actually ejected."

It may be noted that the Full Bench decision uses the words 'legal proceedings instituted against him'. Consequently, so long as a person happens to be one against whom proceedings have been instituted, the fact that a decree has been passed against him will not take him out of such description. But the decision of the Full Bench has no application to a case where the suit was not instituted, as in the present case, against defendants 2 to 7 but against the first defendant Therefore in my view, defendants 2 to 7 do not come within the scope of section 9 of the Madras City

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1. (1924) 47 M L J 350 · I L.R. 47 Mad. 813 (F.B.).

Tenants' Protection Act, 1921, so as to claim the right to apply under that section. I must also point out the fact that the right conferred on a tenant under section 9 of the Act constitutes a serious inroad into the fundamental right of the landlord to hold his own property and he is compelled to sell the property against his volition In such circumstances unless the person comes within the four corners of the language of the section, there is no justification for extending the right or the benefit conferred on a tenant by that section to a person who does not strictly fall within the scope of the section.

In this view, I hold that O.P. No 87 of 1961 filed by defendants 2, 4, 5 and 7 and O.P. No 88 of 1961 filed by the third defendant were not competent, and, consequently, in so far as the Courts below allowed the said applications, they exercised a jurisdiction not vested in them; with the result, the orders of the Courts below in O P. No 87 of 1961 and O P No 88 of 1961 are set aside, and C R P. Nos 876 and 877 of 1965 are allowed For the same reason, the decrees passed by the Courts in the suit and the appeal and the order of remand passed by the learned appellate Judge have to be set aside and S A. No. 1875 of 1964 and C M A No. 302 of 1964 have to be allowed They are accordingly allowed. In view of my conclusion, that defendants 2 to 7 are not entitled to apply for purchase of the land under section 9 of the Act, it will follow that the appellants succeed in the suit for ejectment. The learned District Munsif in paragraph 11 of his judgment has fixed the value of the superstructure on the site at Rs. 3,612-40 P. That determination of the value of the superstructure has become final, since the respondents did not prefer any appeal against that conclusion of the learned District Munsif Though the suit for possession filed by the fourth appellant was dismissed, the learned District Munsif has granted a decree for a sum of Rs. 276 being the arrears of rent in favour of the plaintiff Consequently, in terms of section 4 of the Madras City Tenants Protection Act, in the place of the decree passed by the Courts below, there will be a decree declaring the amount by way of compensation for the superstructure, after setting off the arrears of rent due to the appellants, at Rs. 3,336-40 (Rs 3,612-40—Rs. 276-00); and, on payment by the appellants into the trial Court, within three months from this day, of the said amount, the respondents shall put the appellants in possession of the land with the buildings thereon There will be no order as to costs in these proceedings There will be no leave either in the Second Appeal or in the Civil Miscellaneous Appeal

S.V J.

Revisions, C M A and S A. allowed ; No Leave.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE M. M. ISMAIL

Ammasai Gounder ... *Appellant**

v.

Ravala Gounder (died) by L Rs ... *Respondents.*

Madras Cultivating Tenants' Protection Act (XXV of 1955), sections 2 (aa), 3, 6 and 6-A—Civil Court's jurisdiction when barred—Ejectment suit—Defendant disputing the relationship of tenant and landlord between him and plaintiff—Plea that somebody else is the owner and he is a tenant under that somebody—Defendant not entitled to protection under the Act—Order of transfer by civil Court under section 6-A—When can be made—Essential conditions to be fulfilled before civil Court can order transfer—Necessity of specific and definite finding that defendant is a cultivating tenant and is entitled to the benefits of the Act—Absence of such finding—Order of transfer whether sustainable.

Civil Procedure Code (V of 1908), section 100—"Cultivating tenant"—Finding—Not supported by any evidence—Interference in Second Appeal

The protection against eviction which a tenant has, under the provisions of the Madras Cultivating Tenants' Protection Act, is only against the landlord and not any other person Therefore, if a defendant in a suit for ejectment pleads that the plaintiff in the suit is not his landlord, there is no scope for the defendant contending that he is entitled to any protection under the provisions of the Act. The very basis of the protection conferred by the Act is the existence and the acknowledgment of the relationship of landlord and tenant between the parties and once the defendant in a suit for ejectment pleads that the plaintiff is not the owner of the land and somebody else is the owner of the land and he is a tenant of that somebodyelse, it is not open to him at any subsequent stage of the proceedings to turn round and say that he would admit the title of the plaintiff but would plead for the protection under the Act

Before the civil Court can transfer the matter to the Revenue Divisional Officer under section 6-A of the Madras Cultivating Tenants' Protection Act, three conditions must be fulfilled First, the defendant must be a cultivating tenant, secondly, he must be entitled to the benefits of the Act and thirdly, he must, on transfer of the proceedings from the civil Court to the Revenue Divisional Officer, be in a position to obtain one or the other of the statutory reliefs provided in his favour under the Act. The jurisdiction of the civil Court to transfer a suit to the Revenue Divisional Officer is dependent upon its finding on these three conditions and if any one of these conditions is not fulfilled, the civil Court does not lose its jurisdiction and it cannot transfer the suit to the Revenue Divisional Officer.

Held on facts, that in view of the decision reported in *Ramachandra Sastrigal* v. *Kuppuswami Vanniar*, (1961) I M L.J. 335, the learned Subordinate Judge's conclusion that he was transferring the matter to the Revenue Divisional Officer simply because there was a *prima facie* case is wholly erroneous In the absence of specific and definite finding by the lower appellate Court that the respondent is a cultivating tenant and is entitled to the benefits of the Act, the decision of the lower appellate Court to transfer the matter to the Revenue Divisional Officer cannot be sustained.

Before a Court can find that the respondent is a cultivating tenant, it must necessarily find him to be a cultivating tenant as defined in the Act, and one of the essential ingredients of the definition is that the person who so claims must be carrying on personal cultivation. Admittedly, in this case, there has been no evidence whatever to show that the respondent was carrying on personal cultivation. If that be the case, it is clear that the finding of the learned Subordinate Judge that the respondent is a cultivating tenant is a finding not supported by any evidence on record.

*S.A. No. 1888 of 1962. 29th February, 1968.

Appeal against the Decree of the Court of the Subordinate Judge, Coimbatore in Appeal Suit No. 104 of 1962, preferred against the Decree of the Court of the District Munsif (Additional) of Coimbatore in Original Suit No. 522 of 1960.

T. R. Ramachandran and *N Varadarajan*, for Appellant.

H. Devadass, S W. Kanakaraj and *V. Subramaniam*, for Respondents.

The Court delivered the following

JUDGMENT :—The suit property originally belonged to one Kuppana Goundar who died before 1937. Kulliammal was his widow and he had two sons and four daughters. The respondent herein is the husband of one of the daughters. One of the sons of Kuppana Goundar was Rangappa Goundan who died in 1947 survived by his widow Ayyammal. In view of the fact that the other son of Kuppana Goundar died unmarried even during the lifetime of Rangappa Goundan, Rangappa Goundan became entitled to the entire property of Kuppana Goundar and after his death in 1947 his widow Ayyammal succeeded to the property O.P. No 40 of 1948 was filed by Kulliammal for appointment of guardian for the person and property of Ayyammal who was a minor and that O P. was ordered On 28th August, 1954, Kulliammal executed a lease deed in favour of the respondent herein in respect of the suit property for a period of ten years and received the entire rent in advance On 9th March, 1960, Ayyammal sold the suit property to the plaintiff. Thereafter the plaintiff instituted the present suit, namely, O S. No 522 of 1960 on the file of the Court of the District Munsif of Coimbatore for possession of the suit property and for recovery of mesne profits from the respondent. In the written statement filed by the respondent, he contended that Ayyammal had no title to the property at all and even if she had any title she had lost it by allowing Kulliammal to execute the lease deed and allowing her and the respondent to remain in possession of the property. In paragraph 17 of the written statement, he stated as follows :—

> "The defendant denies and repudiates the allegations in paragraph 19 of the plaint. The defendant has taken the lease deed for the fair rent demanded by the lessor Kulliammal and has also paid the entire rent for the full period of ten years in advance to his lessor. Plaintiff who has no title and right to possession is not entitled to any mesne profits. In any event, the mesne profits claimed is excessive. At all events, the defendant is protected by the provisions of the Madras Cultivating Tenants' Protection Act and in so far as he has paid rents to his landlady Kulliammal, who alone inducted him into possession under the registered lease deed and who has not had any claim or demand from Ayyammal, the alleged vendor of the plaintiff, is not liable to pay any rent to the plaintiff, even under the provisions of the Madras Cultivating Tenants' Protection Act In any view therefore the claim for mesne profits as made by the plaintiff is unsustainable in any event till the full period of lease runs out."

On these pleadings of the parties, the learned District Munsif framed the necessary issues and found the title in favour of Ayyammal and thereafter in favour of the plaintiff and also came to the conclusion that the respondent herein is not entitled to the protection of the Madras Cultivating Tenants' Protection Act, since he was only a trespasser, and by judgment and decree dated 3rd July, 1961, decreed the suit with costs directing the respondent to put the appellant in possession of the suit property. The judgment also provided that mesne profits be determined under separate enquiry under Order 20, rule 12, Code of Civil Procedure. As against this judgment, the respondent preferred A.S No. 104 of 1962 on the file of the Court of the Subordinate Judge of Coimbatore. Before the learned Subordinate Judge, the respondent conceded the title of Ayyammal and therefore the appellant, but contended that he was entitled to the benefits of the Cultivating Tenants' Protection Act and as such the civil Court had no jurisdiction to try the suit The learned Subordinate Judge by his judgment and decree dated 28th November, 1962 allowed the appeal, set aside the judgment and decree of the trial Court and transferred the suit

to the file of the Revenue Divisional Officer, Coimbatore, under section 6-A of the Madras Cultivating Tenants' Protection Act for disposal according to law. The learned Subordinate Judge observes:

"On the consideration of the evidence especially of P.W. 1 and P.W. 3 who admits that Kulliammal was in possession of the land and she had leased out the land to him on behalf of the plaintiff prior to the lease in favour of the defendant-appellant, I have no hesitation in holding that there is *prima facie* case that the defendant-appellant is entitled to the benefits of the Cultivating Tenants Protection Act."

It is against this judgment and decree the present Second Appeal has been preferred by the plaintiff.

Mr. T. R. Ramachandran, learned Counsel for the appellant put forward the following contentions:

1. The respondent having consistently denied the title of the appellant and his predecessor-in-interest in the written statement, it was not open to him, once that case failed, to take up the position that he was a cultivating tenant of the appellant and therefore entitled to the protection of the Madras Cultivating Tenants' Protection Act.

2. The respondent herein did not put forward any case of being a cultivating tenant and therefore being entitled to the benefits of the Act and consequently the civil Court not having any jurisdiction to order ejectment of the respondent.

3. The finding of the learned Subordinate Judge that the respondent is a cultivating tenant within the scope of the Madras Cultivating Tenants' Protection Act, 1955, is not supported by any evidence.

4. The learned Subordinate Judge has merely recorded that there is a *prima facie* case that the defendant-appellant is entitled to the benefits of the Madras Cultivating Tenants' Protection Act and in that view transferred the matter to the Revenue Divisional Officer, Coimbatore. But he is not entitled to do so, in the absence of a definite and clear finding that the respondent is a cultivating tenant and is entitled to the benefits of the Act.

I shall deal with these points seriatim. As I have pointed out already, throughout, the respondent in the written statement, repeatedly contended that the appellant had no title to the property and therefore the appellant was not entitled to seek eviction of the respondent. In my view, the protection against eviction which a tenant has, under the provisions of the Madras Cultivating Tenants' Protection Act, is only against the landlord and not any other person. Therefore, if a defendant in a suit for ejectment pleads that the plaintiff in the suit is not his landlord, there is no scope for the defendant contending that he is entitled to any protection under the provisions of the Act. The very basis of the protection conferred by the Act is the existence and the acknowledgment of the relationship of landlord and tenant between the parties and once the defendant in a suit for ejectment pleads that the plaintiff is not the owner of the land and somebodyelse is the owner of the land and he is a tenant of that somebodyelse, it is not open to him at any subsequent stage of the proceedings to turn round and say that he would admit the title of the plaintiff but would plead for the protection under the Madras Cultivating Tenants' Protection Act. This view of mine finds support in an unreported decision of this Court in *Sabura Ammal and others* v. *Chinnappa Vanniar and others*[1]. Therefore, I hold that the respondent, having taken up a definite and categorical stand, that the appellant did not have title to the property, cannot subsequently, when that case was found against him, turn round and say that he would admit the title of the plaintiff but would plead for protection under the Madras Cultivating Tenants' Protection Act.

1. C.R.P. Nos. 1093 to 1095 of 1957.

With regard to the second point, I have already referred to paragraph 17 of the written statement where alone a reference to the Madras Cultivating Tenants Protection Act finds a place. Even there, from the extract I have given, it will be seen that the reference to the Act has been made only for the purpose of contending that the respondent, having paid the rents to Kulliammal as demanded by her, was not liable to pay any mesne profits. In view of this limited scope of reference to the Madras Cultivating Tenants Protection Act, there was also no specific case put forward by the respondent that he was entitled to the protection under the Act and consequently the civil Court had no jurisdiction to pass a decree of ejectment against him. Therefore, I find the second point also urged by the learned Counsel for the appellant in favour of the appellant.

As far as the third point is concerned, the term, ' cultivating tenant ' has been defined, in relation to any land, as a person who carries on personal cultivation on such land under a tenancy agreement, express or implied. I have already pointed out the circumstance that in the defendant's written statement, the respondent-defendant did not at any stage put forward a case that he is a cultivating tenant coming within the scope of the Act and therefore entitled to the protection of the Act, except the limited reference he has made to that Act in paragraph 17 of the written statement. Before a Court can find that the respondent is a cultivating tenant, it must necessarily find him to be a cultivating tenant, as defined in the Act, and one of the essential ingredients of that definition is that the person who so claims must be carrying on personal cultivation. Admittedly, in this case, there has been no evidence whatever to show that the respondent was carrying on personal cultivation. If that be the case, it is clear that the finding of the learned Subordinate Judge that the respondent is a cultivating tenant is a finding not supported by any evidence on record.

The fourth point is in relation to what the learned Subordinate Judge has recorded as to the *prima facie* case. Panchapakesa Ayyar, J., in *Syed Sahib* v. *Angamuthu Moopan* [1] and *Subbaratnam Iyer* v. *Pattavarthi Moopan*[2], had taken the view that a civil Court, when transferring a suit to the Revenue Divisional Officer, is only required to satisfy itself *prima facie* that the defendant is a cultivating tenant and that it need not give a finding that he is really a cultivating tenant. This view was not approved of by a Bench of this Court in *Ramachandra Sastrigal* v. *Kuppuswami Vanniar*[3]. The learned Judges in that case pointed out:

> "We are of opinion that the view taken by Panchapakesa Ayyar, J., in *Syed Sahib* v. *Angamuthu Moopan*[1] and *Subbaratnam Iyer* v. *Pattavarthi Moopan*[2], is not correct. With great respect to the learned Judge we are unable to subscribe to the view that a *prima facie* finding of the civil Court holding that a party to the suit is a cultivating tenant can deprive the civil Court of its jurisdiction to try the suit making it incumbent on that Court to transfer the suit to the Revenue Court. If the view of the learned Judge as expressed by him in those decisions were to prevail it would lead to anomalous results. What is to happen if the Revenue Court were to hold contrary to the *prima facie* finding of the civil Court that the tenant is not a cultivating tenant entitled to the benefits of the Act? There is no machinery under the Act for the Revenue Divisional Officer to retransfer the proceeding to the file of the civil Court Further the civil Court cannot lose its jurisdiction to try a suit competently laid before it on tentative conclusions or *prima facie* findings Before the civil Court decides not to try a suit it must reach a definite conclusion and must record a comprehensive finding that it has no jurisdiction to deal with the matter. There cannot of course be a summary enquiry by a civil Court on such vital issue as that of jurisdiction to try the suit."

In view of the above decision of a Bench of this Court, the learned Subordinate Judge's conclusion that he was transferring the matter to the Revenue Divisional Officer simply because there was a *prima facie* case is wholly erroneous. Apart

1. (1958) 1 M L J 232
2. (1958) 2 M L J 184.
3. (1961) 1 M.L.J. 335.

from that, before the civil Court can transfer the matter to the Revenue Divisional Officer under section 6-A of the Madras Cultivating Tenants Protection Act, three conditions must be fulfilled. First, the defendant must be a cultivating tenant, secondly, he must be entitled to the benefits of the Act and thirdly he must, on transfer of the proceedings from the civil Court to the Revenue Divisional Officer, be in a position to obtain one or the other of the statutory reliefs provided in his favour under the Act. The jurisdiction of the civil Court to transfer a suit to the Revenue Divisional Officer is dependent upon its finding on these three conditions and if any one of these conditions is not fulfilled, the civil Court does not lose its jurisdiction and it cannot transfer the suit to the Revenue Divisional Officer. In this case, apart from what I have extracted from the judgment of the learned Subordinate Judge, there has been no specific and definite finding by the learned Subordinate Judge that the respondent is a cultivating tenant and is entitled to the benefits of the Act. Because of this as well, the learned Subordinate Judge's decision to transfer the matter to the Revenue Divisional Officer cannot be sustained.

In these circumstances, I allow the Second Appeal and set aside the judgment and decree of the learned Subordinate Judge and restore the decree of the learned District Munsif. There will be no order as to costs in this appeal.

No leave.

S. V. J. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

Janardhanan Pillai ... *Appellant**

v.

Kaliamma and others ... *Respondents.*

Hindu Law—Mitakshara—Succession—Plea of the existence of the custom of Pathini Bhagam—*Custom manifestly different from the general Hindu Law—Absence of satisfactory evidence—Judicial notice of the custom—Custom if and when proved.*

According to the plaintiff, in the Krishnavagakar community, when a man has two wives, on his death his issues share the estate *per stirpes* according to number of wives and not *per capita*, the children of one wife taking among themselves one half and the children of the other wife taking the other half share that is, sharing according to a custom of *Pathini Bhagam*. The plaintiff (the daughter) would have it that this custom extended to a case where one wife had a son (the first defendant) and the other wife had only a female issue, (plaintiff); even in such a case the son or sons by one wife will take a half share and the daughter or daughters by the other wife will take the other half share.

On appeal by the plaintiff from the decision of the Subordinate Judge, the learned District Judge reversed the decision upholding the custom pleaded. His finding of the custom is not based on any appreciation of the oral evidence regarding the custom which had been let in by the plaintiff. He has rested his decision on certain observations in the decisions of Courts relied on for the plaintiff.

Can the custom pleaded be taken judicial notice from the judicial decisions relied upon without further evidence of the custom in the case itself?

Held that, it is admitted in this case that the community is governed by the Hindu Mitakshara law. The custom pleaded manifestly differs from the general Hindu Law. For an alleged custom to receive recognition in a Court of law, there must be satisfactory evidence of usage, long and invariably acted upon in practice, and followed in the community whenever occasion arose as to make out that it has by common consent been submitted to as the established governing

* S. A. No. 1670 of 1962. 29th September, 1966.

rule of the community. When a custom or usage has been repeatedly brought to the notice of Courts, the custom may be held to have been introduced into the law without necessity for proving it in each particular case.

The learned District Judge in the present case has relied on the observations of Sadasiva Aiyar, C J, in *Sadasivam* v. *Gouri* (Kolappa Pillai's Important unreported Travancore Decisions, page 179). It must be noted that in that case the incident of custom of *Pathini Bhagam* as now pleaded was not in issue Therefore, his observations are in the nature of just *obiter* in the course of the discussion of the relevant issues in that case. But there is no record apart from the observations of Sadasiva Aiyar, C J, for the existence of the custom pleaded Neither of the two decisions (Exhibits) was based on an analysis of the evidence, placed before the Court of instances where the custom has been followed or observed. In these two cases, no attempt was made to examine whether the custom or usage pleaded had all the essential attributes of customary law—antiquity, certainty, invariability and reasonableness. At the most all that could be said to have been shown in the present case is the prevalence of an idea of the existence of such a custom.

Appeal against the decree of the District Court, Kanyakumari at Nagercoil in Appeal Suit No 16 of 1962 preferred against the decree of the Court of the Subordinate Judge of Padmanabhapuram in Original Suit No 3 of 1961.

P. Ananthakrishnan Nair, for Appellant.

T. R Ramachandran and *N. Varadarajan*, for Respondents

The Court delivered the following

JUDGMENT.—The first defendant in a suit on the file of the Subordinate Judge of Padmanabhapuram, the decision in whose favour was reversed on appeal by the District Judge, Kanyakumari, is the appellant in the Second Appeal Though the relief in the suit is one for partition, the substantial question involved is the validity of a family arrangement entered into during the minority of the plaintiff by the plaintiff's mother as guardian. The suit properties were held as joint family properties by the plaintiff's father Aiyappan Pillai Mathavan Pillai who died on the 17th of January, 1949 He died leaving Janardhanan Pillai the appellant who is the son by his first wife, the plaintiff his daughter by his second wife, and the second wife Lakshmi, the second defendant in the suit On the 15th of July, 1958, on behalf of the plaintiff her minor daughter and on her own behalf the second defendant entered into the family arrangement evidenced by a registered deed of partition (Exhibit A-1, registration copy), whereunder the suit properties were divided principally between the first defendant and the plaintiff Nine items roughly about a fourth share in the properties were allotted for the plaintiff and her mother, the second defendant. Of these the second defendant, was given a right of enjoyment for life in respect of four items the said items to go to the plaintiff after her lifetime The remaining five items of property were to be taken by the plaintiff on her attaining majority and during her minority these items were to be managed by the second defendant The deed provided that from out of the properties allotted the maintenance and marriage expenses of the plaintiff should be met. There was a provision in the deed permitting the second defendant to raise money on security of the properties for the purpose of making ornaments for the plaintiff and meeting her marriage expenses The absolute title of the plaintiff to the properties given to her, was recognised The first defendant himself undertook to discharge the encumbrance if any on the properties that were allotted to the plaintiff. The document recited the circumstances which necessitated the family arrangement. A number of litigations had cropped up between the parties. The first defendant claimed that he was the sole heir of his father and he had instituted a suit Original Suit No. 686 of 1955, challenging the claim of the plaintiff and her mother to shares in the properties of the deceased. Competing mortgages over some properties were

made by the parties and this had resulted in hotly contested litigations between the creditors and the parties. It is in these circumstances that on the advice of relations of the parties and respectable persons of the locality the settlement is stated to have been arrived at providing maintenance for the widow for her life and provision for the marriage and maintenance expenses of the plaintiff. It is agreed on both sides that the plaintiff and the second defendant are in possession of the properties that have been allotted to them under the deed of family arrangement.

The basis of the suit is the claim by the plaintiff that under the customary law prevalent in the Krishnavagakar community to which the parties belonged the plaintiff was entitled to a half share in the family properties, and that she had been deprived of her lawful share in the properties under the family arrangement entered into by her mother acting in collusion with the first defendant.

In the Second Appeal the existence of the custom pleaded is the only question that falls for consideration. It is not in dispute that the family of Mathavan Pillai belonged to the Krishnavagakar community following *Makkavazhi*. In this community according to the plaintiff when a man has two wives, on his death his issues share the estate *per stirpes* according to number of wives and not *per capita*, the children of one wife taking among themselves one half share and the children of the other wife taking the other half share that is, sharing according to a custom of *Pathni Bhagam*. The plaintiff would have it that this custom extended to a case where one wife had a son and the other wife had only female issues ; even in such a case the son or sons by one wife will take a half share and the daughter or daughters by the other wife will take the other half share. The learned Subordinate Judge in the Court of first instance, on a careful consideration of the evidence in the case regarding the custom, held that the plaintiff has not succeeded in proving the custom in the community, of a daughter by one wife succeeding to the family properties along with a son by another wife He found that there was no proof of any fraud in the execution and registration of the deed of family arrangement, and that there was no case for holding that the mother had acted against the interests of her daughter. In the circumstances, he saw no reason for setting aside the family arrangement and found that it was valid and binding on the parties.

On appeal the learned District Judge has reversed the decision upholding the custom pleaded. His finding of the custom is not based on any appreciation of the oral evidence regarding the custom which had been let in by the plaintiff In fact, there is no discussion at all of the oral evidence let in by the plaintiff. The trial Court had discarded the oral evidence. It observed :

> "Thus on going through the entire oral evidence it is very difficult to hold that there is any such custom established in this case. The witnesses speak to various customs and if the plaintiff's witnesses are to be believed, if sons and daughters get equally ; then D-1's sisters will also be entitled to shares in the father's properties. But they are not made parties to the suit."

It found that the evidence for the plaintiff was most unsatisfactory and unreliable. On behalf of the first defendant D W. 2 has been examined to show that the custom was not prevalent in the community. The learned Subordinate Judge remarked he was a respectable witness and no circumstances had been elicited in his cross-examination to disbelieve his testimony. In the view of the learned Subordinate Judge the judicial recognition of the custom brought to his notice was not sufficient to accept the custom as established law. The learned District Judge has just one remark to make in regard to the evidence led in by the plaintiff :

> "Therefore it is immaterial whether the evidence let in by the plaintiff is not par excellence."

He has rested his decision on certain observations in the decisions of Courts relied on for the plaintiff. It will, therefore, be necessary to examine whether the judicial decisions relied upon by the learned District Judge warrant an inference that the

custom has become sufficiently established in the community of Krishanavagakars, to be taken judicial notice of without further evidence of the custom in the case itself.

The jurisdiction of this Court to consider this question in Second Appeal is not disputed. Questions as to the existence of a custom or usage having force of law quite often come as mixed questions of fact and law This Court in Second Appeal cannot interfere with the findings of fact from which the custom or usage has been inferred, or is to be inferred; nor can this Court interfere with the credibility or sufficiency of the evidence in support of the facts on which the custom is rested. If the Courts below have found instances where the custom has been followed or adopted or varied from, this Court cannot reassess the evidence in regard to them. But whether the facts found establish the necessary elements to warrant an inference of the existence of a custom or usage having force of law, will be a matter for consideration in Second Appeal While the finding that there is a particular usage will be a finding of fact, the question whether the usage has developed into the customary law of the locality or of community will be a question of law. Here again the approach will not be just to judge the sufficiency of evidence or merely count the number of instances. What may be looked for in the Second Appellate stage is whether the instances adduced show invariability and certainty. Another essential element that has to be looked for before concluding that a custom or usage has force of law is its antiquity and a custom to receive recognition must be reasonable. It is admitted in this case that the community is governed by the Hindu Mitakshara law The custom pleaded manifestly differs from the general Hindu Law For an alleged custom to receive recognition in a Court of law, there must be satisfactory evidence of usage, long and invariably acted upon in practice and followed in the community whenever occasion arose as to make out that it has by common consent been submitted to as the established governing rule of the community. The incidents of the custom must not be left in doubt, but must be proved with certainty. See *S. Perumal Se hurayar* v. *M. Rama inga Sethurayar*[1]. A custom is proved either by actual instances or by general evidence of the members of the community who would be naturally cognisant of its existence. Of course when a custom or usage has been repeatedly brought to the notice of course, the custom may be held to have been introduced into the law without necessity for proving it in each particular case. In *Pemraj* v. *Chand Kanwar*[2], the judicial Committee observed :

> "It is not doubtful that the ordinary rule is that a party relying on a custom affecting the Jains which is at variance with the ordinary Hindu Law must allege and prove it But it is equally beyond doubt that a custom which has been recognised and affirmed in a series of decisions each of them based on evidence adduced in the particular case, may become incorporated in the general law, with the result that the *onus* of proof no longer lies on those who assert it but upon those assert an exception to it In *Rama Rao* v *Rajah of Pittapur*[3]." Lord Dunedin observed :

> "No attempt has been, as already stated , made by plaintiff to prove any special custom in this zamindari. That by itself in the case of some claims would not be fatal. When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case It becomes in the end truly a matter of process and pleading Analogy may be found in instances in the law merchant or in certain customs in copy-hold tenure In the matter in hand their Lordships do not doubt that the right of sons to maintenance in an impartible zamindari has been so often recognised that it would not be necessary to prove the custom in each case "

1. (1866) 3 M.H C R 75, 77.
2. L.R. 74 I.A. 254 . (1947) 2 M L J 516, I.L.R. 41 Mad. 778, 785 (P.C.).
3. (1918) 35 M L J 392 L R 45 I.A. 148: 517 (P.C.).

What has to be examined in the instant case is whether the custom pleaded and relied upon has been so repeatedly brought to the notice of Courts and so often recognised that it is no longer necessary to prove the existence of the custom in this case. It is seen from the *Travancore State Manual* published in 1906 that the community of Krishnavagakaras are Hindus of the Sudra caste and formed part of the great pastoral caste of South India, which after a time became mainly agricultural, and that there were two divisions in the caste, one following the makkathayam system of inheritence and other, marumakkathayam In *Bhagawathi* v *Mathavan*[1], it is observed that Krishnavagakars followed the Hindu Law with one or two points of divergence from it, namely, the widow cohabiting with the brother of her deceased husband and the existence of *Pathini Bhagam* The incidence of the custom of *Pathini Bhagam* was not discussed and did not come up for discussion in the case The particular custom pleaded in the present case is found recognised in a suit, Original Suit No. 109 of 1096 M E decided in December, 1923, in the District Court of Nagercoil. The certified copy of the judgment has been marked as Exhibit B-6 The acceptance of the custom in that case was not based on any evidence of instances adduced in the case. The learned District Judge followed the observations in *Sadasivam* v. *Gouri*.[2] Taking the observations as the established law, the plaintiffs in the case were granted a half share in the assets of the deceased in the case There is a discussion of the custom of *Pathini Bhagam* in the Krishnavagakar community again, in *Saraswathi Amma* v. *Thanu Pillai*[3] The case arose out of a suit filed by a reversioner to set aside the mortgage executed by the widow of a member of the Krishnavagakar community on the ground of absence of necessity and lack of consideration. In an attempt to maintain the validity of the mortgage a contention was raised in the High Court that on account of the custom of *Pathini Bhagam* prevailing in the community the widow took an absolute interest and the reversioners had, therefore, no right to question the alienation It is apparent that the incidents of the custom of *Pathini Bhagam* pleaded in that case was of an entirely different character. It was pleaded that it was implied in the principle of *Pathini Bhagam* that on the death of her husband a Krishnavagakar woman, in the absence of children, was entitled to inherit her husband's property absolutely The learned Judges held that the term '*Pathini*' *Bhagam* did not carry with it the implications as suggested They referred to the concept of *Pathini Bhagam* found in Sarkar Sastri's Hindu Law (eighth edition, page 406).

> The division by number of sons is called *Putrabhag* but there exists a custom, in some parts of India, called *Pathinibhag* by which the division is according to the number of wives and the sons by each wife constitute a unit.

The learned Judges referred to *Bhagwathi* v *Mathavan*[1], and *Sadasivam* v. *Gouri*[2] and observed :

> In other words, in terms of the relevant facts of this case, the custom of the Krishnavagakar community varying the general rule of Hindu Law, as recognised by this Court, in *Bhagavathi* v *Mathavan*[1], serves to import only the idea that the division of family property among sons of a member of that community must be according to the number of the wives of their father, instead of the same being among all the sons of the father equally, this peculiar mode of division being known as *Pathini Bhagam*, as distinct from the general mode of division recognised by Hindu Law of *Puthra Bhagam* That this alone was intended by the learned Judges who decided *Bhagavathi* v *Mathavan*[1], is further clear from the decision of this Court in *Sadasivam* v *Gouri*.[2]

In *Sadasivam* v *Gouri*[2], there is no doubt a reference to the custom as now pleaded by the plaintiff. It will be seen in the decision *Saraswathi Amma* v *Thanu Pillai*[3],

1. 8 T L R. 51.
2. Kolappa Pillai's Important unreported Travancore decisions page 179.
3. (1944) T.L.R. 710.

itself where the relevant portions in *Sadasivam* v. *Gouri*[1] are set out, there is no reference or recognition of the custom now pleaded On the contrary the incidents of the custom of *Pathini Bhagam* are limited contrasting it with *putra bhagam*. But in *Sadasivam* v. *Gouri*[1] Sadasiva Aiyar, C J, while concurring with Padmanabha Aiyar, J., has of course stated

> "It has been clearly established in *Bhagavathi* v *Mathavan*[2], that in the Krishnavagakar community division is by *pathini bhagam* among the children . But there is no interest or patent immorality in the usage of *pathini bhagam* and no such overwhelming preponderance of views in favour of a change of custom of *puthra bhagam* within the 15 1/2 years after the decision in *Bhagavathi* v *Mathavan*[2], has been proved in the present case The *Pathini Bhagam* which prevails in this community seems to go even beyond the usual custom known as *Pathini Bhagam* For I find from the evidence that it is not only sons of different mothers that take *per stirpes* (according to the number of mothers) but when one mother has got only female issue and another a male issue, the female issue gets a half share in their father's properties and the male issues by the other wife of the father takes the other half."

But the other learned Judge Padmanabha Aiyar, J, who delivered the leading judgment does not refer to this further incidents of the custom

The learned District Judge in the present case has relied on the aforesaid observations of Sadasiva Aiyar, C J. It must be noted that in that case the incident of custom of *Pathini Bhagam* as now pleaded was not in issue The learned Judge Sadasiva Aiyar, C J, has noticed the extent to which the evidence in the case let in about the custom went. The learned Judge points out that it was beyond the usual custom known as *pathini bhagam* The observations.

> " The *Pathini Bhagam* which prevails in the community seems to go even beyond the usual custom known as *Pathini Bhagam* "

and following are in my view just obiter in the course of the discussion of the relevant issue in that case. In *Palaniappa Chettiar* v *Alagan Chetti*[1], the prevalence of the custom of *Pathini Bhagam* in parts of South India is referred to. In Mayne's Hindu Law, eleventh edition, at page 523, in the foot note, reference is made to the existence of the custom of *Pathini Bhagam* in some families of dividing properties according to mothers But there is no record apart from the observations of Sadasiva Aiyar, C J, in *Sadasivam* v *Gouri*[1] for the existence of the custom of *Pathini Bhagam* where one of the wives has only female issues, and there are male issues to the other wife There is one other case, Original Suit No 18 of 1959, on the file of the District Munsif, Kuzhithurai, that may be referred to where there is recognition of the custom pleaded But the observations are too general The learned District Munsif in loose language observes that this community does not follow the Hindu Mitakshara law and that there was authority for the position that this community followed the system known as *Pathini Bhagam* under which the property of the deceased was inherited according to the number of widows he had irrespective of the existence of children of the deceased The custom for which it is stated that there was authority goes further than the observations in the decisions noticed above According to the learned District Munsif even a widow without issue could claim a share No doubt the custom in the present form was also recognised. Exhibits A-5 and A-6 are the only decisions where it can be said that the particular custom now pleaded gets judicial recognition But one of the requirements pointed out by the Judicial Committee in *Pemraj* v *Chand Kanwar*[4] that each

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1 Kolappa Pillai's Important unreported Travancore decisions page 179
2. 8 T.L.R 51.
3. (1921) I.L.R. 44 Mad. 740 (P.C.) : L.R 48 I A 539
4 L R 74 I A. 254 . (1947) 2 M.L J. 516, 517 (P C.).

of the decisions relied upon must be based on evidence adduced in that particular case, is wanting. Neither of the two cases was based on an analysis of the evidence placed before the Court of first instance where the custom has been followed or observed. The existence of the custom is more or less taken for granted. These judgments cannot, therefore, be relied upon for conferring on the custom the force of law.

Before a custom or usage can be taken to be incorporated in the general law, there must have been repeated recognition by Courts on the evidence adduced in the cases. I have already pointed out that the view of Sadasiva Aiyar, C J., in *Sadasivam* v. *Gouri*[1] was only a passing observation of the learned Judge as noticed in the evidence in the case as to the custom Thus, the evidence of specific instances of the observance of the custom is wanting in the present case. Repeated recognition of the custom in judicial decisions based on evidence adduced in each case is equally wanting At the most all that could be said to have been shown in the present case is the prevalence of an idea of the existence of such a custom No attempt has been made in the only two cases where the custom in question directly came up before Court, to examine whether the custom or usage pleaded had all the essential attributes of customary law—antiquity, certainty, invariability and reasonableness. This is sufficient to dispose of the case. It is not further necessary to find specifically that the custom does not exist. In the circumstances the decision of the learned District Judge cannot be upheld. The plaintiff's claim to a half share in the estate of her deceased father on the basis of the custom, therefore, fails

On this view it is unnecessary to consider the validity of the family arrangement. Counsel for the first defendant stands by the family arrangement and asserts its validity and binding nature He contended that in any event it could be looked upon as settlement of doubtful claim The only case pleaded to vitiate the arrangement was the alleged collusion between the mother of the plaintiff and the first defendant to defeat the plaintiff of her lawful share. There was no evidence of such collusion and it was found against by the trial Court It was not pleaded that sanction of the Court had not been obtained in the Original Suit No 686 of 1955 between the parties pending which the settlement was entered into. The partition specifically refers to the suit and the settlement. Learned Counsel contends that the circumstances of the case do not warrant any inference in the absence of plea that all necessary steps would not have been taken. That suit admittedly had not been taken to conclusion and in all probability sanction of the Court should have been obtained. It is quite apparent that in the Courts below the invalidity of the family arrangement was rested solely on the existence of the custom As the custom has not been proved in this case, there is no question of invalidating the family arrangement. Neither side calls for it

In the result the Second Appeal is allowed. The decree and judgment of the learned District Judge are set aside and those of the trial Court restored In the circumstances the parties will bear their own costs throughout. No leave.

V.M.K. *Second Appeal allowed.*

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1. Kolappa Pillai's Important unreported Travancore decisions page 179.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE A. ALAGIRISWAMI.

S. Vellaya Gounder .. *Appellant**

v

R. Venkatesa Chettiar and another .. *Respondents.*

Limitation Act (IX of 1908), *section* 21 (2)—*Applicability of—Dealings between plaintiff and defendants, partners—Periodic settlement of accounts signed by one of the partners alone—Absence of authority to acknowledge on behalf of other partner—Effect of—Suit by plaintiff on basis of the last of such settlements—Limitation—Whether acknowledgment by one partner saves limitation in respect of claim as against the other partner.*

Held, in the present case, it is the third defendant who has been signing the account book all through and nowhere has the first defendant signed. There are no circumstances available in this case to show that the acknowledging partner had authority to acknowledge on behalf of the silent partner. The result is that the conclusion of the lower appellate Court that the mere fact that the third defendant purports to sign on behalf of the first defendant also was enough to show that the suit as against the first defendant also is in time is not correct in law.

Appeal against the Decree of the Court of the Subordinate Judge, Salem, dated 21st February, 1963, in Appeal Suit No 241 of 1962, preferred against the decree of the Court of the District Munsiff of Salem in Original Suit No 856 of 1960.

G Ramanujam, for Appellant.

M R Krishnan and *S M Amjad Nainar*, for Respondents.

The Court delivered the following

JUDGMENT.—The first defendant in the suit and the third defendant were part ner in a venture, and they had dealings with the plaintiff. The accounts were periodically settled, and signed by the third defendant alone. The suit was filed within three years of the last of such settlements signed by the third defendant, but beyond a period of three years in respect of anything which could show that the first defendant had acknowledged liability. The trial Court held that in the circumstances the acknowledgment by the third defendant could not save limitation as against the first defendant. But the appellate Court took a different view, allowed the appeal in part and decreed the suit as against the first defendant also. The first defendant is the appellant before this Court.

The lower appellate Court took into consideration the wording of the acknowledgment signed by the third defendant in Exhibit A-4 and thought he purported to sign the acknowledgment on behalf of both himself and the first defendant. I do not think that this circumstance alone is enough to enable the acknowledgment by the third defendant to save limitation in respect of the claim as against the first defendant. Section 21 (2) of the Indian Limitation Act says :

> " Nothing in sections 19 and 20 renders one of several joint contractors, partners, executors of mortgagee chargeable by reason only of a written acknowledgment signed or of a payment made by, or by the agent of, any other or others of them. "

The earlier view of this Court in *Balasubramania Pillai* v *S V R R M. Ramanathan Chettiar*[1] and *Shaik Mohideen Sahib* v *Official Assignee of Madras*[2] seems to have been that where one partner signs an acknowledgment it was necessary in order to bind the other partner, to have direct evidence that the partner acknowledging had been authorised by the other partner to acknowledge it on his behalf These two decisions of this Court were considered by the Bench which came to consider the case reported in *Pandiri Veeranna* v. *Grandi Veerabhadraswami* alias *Veerabhadurudu*[3] as not being in

*S A No 1455 of 1963 17th July, 1967.

1 (1909) I L R 32 Mad 421
2. (1912) I L R 35 Mad 142
3. (1918) 34 M L J 373 I L.R 41 Mad. 427.

consonance with the view taken by other Courts in India as also the views taken by Courts in England where the provisions are substantially the same as in India. The matter was therefore referred to a Full Bench and the Full Bench has held that direct evidence of a specific authority to give acknowledgments is quite unnecessary and such authority may be inferred from the surrounding circumstances, though it is of course quite beyond our province (the province of this Court) to indicate what circumstances could be deemed sufficient to warrant the inference The Full Bench made it clear that section 21 (2) amounts to saying that if you have no more than a written acknowledgment signed by one defendant the fact that the other defendant is his partner cannot affect the latter's liability They also referred to the general principle of law embodied in section 251 of the Contract Act that partners are the agents of one another and that their acts done in the ordinary course of the partnership business bind the partnership All the same, they had not based their decision on the fact that an acknowledgment by one partner would bind another partner because such acknowledgment is done in the ordinary course of the partnership business. In fact, the circumstances of that case were that the partner who was sought to be made liable as a result of the acknowledgement made by the other partner had, on an earlier occasion, accepted his personal liability for the whole of the amount This, apparently, was the circumstance which the Bench was content to consider as a circumstance which shows that the partner acknowledging on the subsequent occasion had the authority to acknowledge on behalf of the other partner.

In the present case, it is the third defendant who has been signing Exhibit A-3 the account book all through and nowhere has the first defendant signed. Wallis, C J, in his referring judgment in *Pandiri Veeranna* v *Grandhi Veerabhadraswami* alias *Veerabhadurudu*[1] had pointed out that in the decision in *Shaik Mohideen Sahib* v. *Official Assignee of Madras*[2] it was expressly decided that the fact of a partner being left in management of a business did not give rise to a presumption that he was authorised to sign acknowledgments and to the fact that he had pointed out in *K. R V Firm* v *Seetharamiswami*[3] that a different view has been taken by other Courts in India and also apparently in England However, the Full Bench did not proceed on the footing that the fact that a partner being left in management gave rise to a presumption that he was authorised to sign acknowledgments The decision in the above Full Bench case cannot therefore, help the respondent in this case. There are no circumstances available in this case as were available in the case reported in *Pandiri Veeranna* v *Grandhi Veerabhadraswami* alias *Veerabhadurudu*[1] to show that the acknowledging partner had the authority to acknowledge on behalf of the silent partner. The result is that the conclusion of the lower appellate Court that the mere fact that the third defendant purported to sign on behalf of the first defendant also was enough to show that the suit as against the first defendant also is in time is not correct in law The Second Appeal is, therefore, allowed and the decree of the trial Court will be restored There will however be no order as to costs the appeal in this suit Leave granted.

S V J.

Second Appeal allowed ;
Leave granted.

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1 (1918) 34 M L J 373 I L R 41 Mad 427
2 (1912) I L R 35 Mad. 142.
3. (1914) 25 M L J 501, I.L.R. 37 Mad 146

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE A. ALAGIRISWAMI.

P. Jagajothi Mudaliar .. *Appellant**

v.

Gopalaswami Gounder and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 35 (2)—Purchase of an undivided share in joint family property in Court auction—Purchaser getting symbolic delivery—Effect of—Whether interrupts adverse possession.

Held, the present case is exactly on all fours with the facts in the decision of the Supreme Court reported in *Manikayala Rao* v. *Narasimhaswami* (1967) 1 S.C.J. 110: (1967) 1 M.L.J. (S.C.) 29 : (1967) 1 An.W.R. (S.C.) 29 : A.I.R. 1966 S.C. 470. In this case also, Exhibit A-2 shows that the Court auction purchaser obtained symbolical possession and that possession would only be under Order 21, rule 35 (2), Civil Procedure Code. Exhibit A-2 shows that the exact provisions of Order 21, rule 35 (2), Civil Procedure Code, have been complied with. It is clear beyond doubt that the delivery in the present case was also one under Order 21, rule 35 (2), Civil Procedure Code, and the decision of the Supreme Court will govern the facts of this case.

It follows therefore that the view of the Courts below that limitation began to run from the date of confirmation of the Court sale in favour of plaintiff's vendor and that symbolic delivery obtained by him would not interrupt the adverse possession of the defendants, because no order for symbolic delivery could have been made under the provisions of the Hindu Law is not correct and the suit should be held to be in time.

Held further that the view taken in *Thani Chettiar* v. *Dakshinamurthy Mudaliar*, I.L.R. (1955) Mad. 1278 : (1955) 1 M.L.J. 414 and *Ramaganesan Pillai* v. *Rajah Ayyar*, (1963) 2 M.L.J. 162 is no longer good law in view of the decision in *Manikayala Rao* v. *Narasimhaswami*, (1967) 1 S.C.J. 110 : (1967) 1 M.L.J. (S.C.) 29 : (1967) 1 An.W.R. (S.C.) 29 : A.I.R. 1966 S.C. 470.

Appeal against the Decree of the Court of the Subordinate Judge, Cuddalore, in Appeal Suit No. 285 of 1960, preferred against the decree of the Court of the District Munsiff of Villupuram in Original Suit No. 353 of 1959.

V. Thyagarajan, for Appellant.

R. Ramamurthy Iyer, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant. He purchased the one-fourth share belonging to defendants 1 and 2 in the properties described in Schedule '*A*' belonging to the joint family of which they were members, from one Abdul Rahiman Rowther. This Abdul Rahiman Rowther purchased the one-fourth share belonging to defendants 1 and 2 in the Court auction sale on 20th November, 1944, and he took symbolical delivery of the properties on 19th September, 1947. On 10th December, 1958, the plaintiff purchased the suit properties. It appears that subsequently there has been a partition in the family of the defendants, under which the '*B*' schedule properties were allotted to the share of defendants 1 and 2. The plaintiff filed the suit out of which the present appeal arises for partition and possession of one-fourth share in the '*A*' schedule properties, or, in the alternative for the '*B*' schedule properties being allotted to him on 14th July, 1959. The trial Court held that the symbolical delivery obtained by the plaintiff's vendor was not valid in law and that therefore it would not interrupt the adverse possession of the defendants. Following the decision in *Thani Chettiar* v. *Dakshinamurthy Mudaliar*[1] it held that the period of limitation began to run from 23rd December, 1944, that is, the

*S.A. No. 208 of 1962. 23rd August, 1967.

1. (1955) 1 M.L.J. 414 : I.L.R. (1955) Mad. 1278.

date of confirmation of the Court-auction sale in favour of the plaintiff's vendor. The appellate Court agreed with the view of the trial Court, and holding that the plaintiff's suit was barred by limitation, dismissed the plaintiff's appeal. The plaintiff has therefore preferred the present appeal.

In *Thani Chettiar v Dakshinamurthy Mudaliar*[1] a bench of this Court held that in a case of this kind, it is not competent for a Court, on a mere application for execution by the purchaser of an undivided share to pass an order directing delivery of possession and that such a purchaser cannot have the benefit of a fresh cause of action by any symbolical delivery, which in law could not have been made. This Court held that the case of a purchaser of an undivided share in joint family property was one where there can be no delivery, either symbolical or actual. This view was approved by a subsequent Full Bench of this Court and the decision is reported in *Ramaganesan Pillai* v. *Rajah Ayyar*[2].

The view taken in these two decisions is no longer good law in view of the decision of the Supreme Court in *Manikayala Rao* v *Narasimhaswami*[3]. That was also a case where a purchaser of the undivided interest of a joint family member applied for delivery of possession under Order 21, rule 35 (2), Civil Procedure Code, and obtained joint possession Their Lordships held in discussing the question whether this symbolical delivery would interrupt the adverse possession, as follows :—

> " It seems to us that the question of adverse possession is one of fact. If the person against whom adverse possession is set up, shows that he had in fact obtained possession, whether lawfully or not, that would interrupt any possession held adversely against him The question is whether there was in fact an interruption of the adverse possession and not whether that interruption was justifiable in law under the order for delivery of symbolical possession, whether it was legal or otherwise. Prakasailingam did obtain possession and this was an interruption of the adverse possession by the respondent In respect of the present suit, time under Article 144 must, therefore, commence from that interruption. "

It was however sought to be argued by Mr Ramamurthi Iyer, for the respondent, that, in that case, the Court-auction purchaser had actually obtained possession and that is not the case here But I do not think Mr Ramamurthi Iyer's contention is correct. It is specifically referred to in the judgment that the order for delivery was one under Order 12, rule 35 (2), Civil Procedure Code, and in paragraph 11, their Lordships again stress the fact that the only order for delivery of possession that could possibly be made under the Code in the case was one under Order 21, rule 35 (2), Civil Procedure Code, because the other members of the family, whose share had not been sold, were entitled to remain in possession They further remark that the fact that under the provisions of the Hindu Law, the order made is illegal is irrelevant for their purpose It would thus be seen that the present case is exactly on all fours with the facts in the decision of the Supreme Court. In this case also, Exhibit A-2 shows that the Court-auction purchaser obtained symbolical possession and that possession would only be under Order 21, rule 35 (2), Civil Procedure Code. Exhibit A-2 shows that the exact provisions of Order 21, rule 35 (2), Civil Procedure Code, have been complied with It is clear beyond doubt that the delivery in the present case was also one under Order 21, rule 35 (2), Civil Procedure Code, and the decision of the Supreme Court will govern the facts of this case.

It follows therefore that the view of the Courts below that limitation began to run from the date of the confirmation of the Court sale in favour of the plaintiff's vendor and that the symbolical delivery obtained by him would not interrupt the adverse possession of the defendants, because no order for symbolical delivery could have been made under the provisions of the Hindu Law, is not correct, and the suit should be held to be in time

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1 (1955) 1 M L J 414 I.L.R (1955) Mad 1278

2. (1963) 2 M L.J. 162.

3 (1967) 1 S C J 110 (1967) 1 M L.J (S.C.) 29 (1967) 1 An W R. (S C) 29 · A.I.R 1966 S C 470

It is not necessary to say anything more except that whatever questions might arise in a suit by an alienee of a joint family property for partition and possession of the share alienated to him would have to be considered before the suit is disposed of the fact that subsequent to the Court-auction purchase by the plaintiff's vendor, there has been a partition in the family and the '*B*' schedule properties were allotted to the share of the defendants 1 and 2, whose undivided share in the joint family properties it was that the plaintiff's vendor purchased in the Court-auction, or the fact, as it appears, that defendants 1 and 2 have disposed of either the whole or part of the '*B*' schedule properties to other persons, are all matters which should be taken into consideration in the decree for partition to be passed by the trial Court.

The appeal is therefore allowed. The trial Court will take the suit on file and dispose it of in the light of the observations above. The costs of the plaintiff before the lower appellate Court and this Court will abide by and be provided for in the fresh decree to be passed. The plaintiff will get a refund of the Court-fee paid in this Court and in the lower appellate Court.

S.V J. ——— *Appeal allowed and remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

Veeraswami Mandiri .. *Appellant**

v.

K. Manicka Mudaliar and others . *Respondents.*

Limitation Act (IX of 1908), Articles 134, 144 and 148—Applicability of—Property belonging to plaintiff and his brother usufructuarily mortgaged—Creditor of plaintiff's brother, in execution of his decree, purchasing the property in Court-auction subject to usufructuary mortgage—Creditor-purchaser redeeming the mortgage and entering on possession—Sale of property by him—Transferee in possession for over 20 years following such sale—Plaintiff aware of the same—Suit for redemption by plaintiff—Article 134 applies—Suit barred.

Held, in the present case, if the plaintiff would have the suit as one for possession on redemption and rely on Article 148, in its wake, it will draw in Article 134. If the plaintiff would look upon Muthuvelu Pillai as mortgagee for purposes of Article 148, the persons claiming under him, would be transferees from him for purposes of Article 134. There is no dispute that in this case Muthuvelu Pillai had transferred a larger interest than what he acquired in law under the Court auction purchase in execution of the decree against his mortgagor. As a matter of law, the Courts below have found that the interest of the plaintiff in the property had not been transferred by the Court auction sale to Muthuvelu Pillai. It is admitted by the plaintiff that he has been aware of the transfer by Muthuvelu Pillai and the possession of the defendants following such transfer. On the evidence it is clearly made out that for over 20 years to the knowledge of the plaintiff the transferees from Muthuvelu Pillai have been in enjoyment of the property in assertion of ownership of the entirety of the suit property. It follows that the plaintiff's suit for redemption has to fail under Article 134.

Obiter —If Article 144 is applied, even then, clearly the action is barred.

Appeal against the Decree of the Court of the Subordinate Judge, Vellore, in Appeal Suit No 39 of 1963, preferred against the decree of the Court of the District Munsif of Vellore in Original Suit No 669 of 1960.

K. Sarvabhuvanam, T.R. Mani and *S. Narayanan* for Appellant.

P. R. Gokulakrishnan, P. Bhaskaran and *K. N. Balasubramaniam*, for Respondents.

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*S A No 1728 of 1963. 3rd November, 1967.

The Court delivered the following

JUDGMENT.—This Second Appeal has been filed by the 2nd defendant in a suit for redemption of a possessory mortgage of the suit property made by the plaintiff along with his brother Venkataswami Mudaliar in favour of the 3rd defendant in the suit, and for partition and separate possession of a half share in the suit property. The trial Court dismissed the suit holding that the contesting defendants in the suit have perfected their title by adverse possession against the plaintiff, but on appeal, the learned Subordinate Judge has overruled the defence of limitation and decreed the plaintiff's claim for a half share in the suit property

A brief survey of the salient facts and findings in the case is necessary for appreciating the respective contentions of the parties on the question of limitation, the only question for consideration The suit property, dry land of an extent of 3 acres 20 cents, in North Virinchipuram village, North Arcot District, belonged to the plaintiff and his elder brother Venkataswami Mudaliar aforesaid Under Exhibit B-3 dated 9th February 1934, the two brothers usufructuarily mortgaged the property in favour of Subramania Mudaliar, 3rd defendant in the suit for a sum of Rs 400. Venkataswami Mudaliar was indebted to one Muthuvelu Pillai under a promissory note, and Muthuvelu Pillai filed a Small Cause Suit, S C No 533 of 1935, on the file of the District Munsif's Court, Vellore. In execution of the decree thereon which had been transferred to the original side Muthuvelu Pillai attached the entirety of the suit property and purchased the same in Court auction Exhibit B-1, dated 25th September 1936, is the sale certificate It is seen from the sale certificate that the property had been sold subject to two agricultural loans of Rs 150 each and the suit usufructuary mortgage Muthuvelu Pillai having taken formal delivery of the suit property through Court on 6th November, 1936 discharged the usufructuary mortgage debt due to the 3rd defendant and redeemed the mortgage on 9th November 1936. Pursuant to the redemption which was on 9th November, 1936 he entered on possession of the property The deed of mortgage contains the relevant endorsement of discharge under date 9th November 1936 There is also documentary evidence of actual possession and enjoyment of the suit property by Muthuvelu Pillai, till he sold the property to the 1st defendant in the suit and her sister one Rajammal under Exhibit B-11 dated 24th January, 1939 The 2nd defendant purchased the half share of Rajammal in the property under Exhibits B-12, dated 19th November, 1959 and B-13, dated 21st February,1960, for a total consideration of Rs 6,000 and the Courts below find that after Muthuvelu Pillai, the 1st defendant and Rajammal and after her, the 2nd defendant, had possession and enjoyment of the suit property in their own right as absolute owners In fact, under Exhibit B-9, dated 13th April, 1942 the 1st defendant usufructuarily mortgaged the property in favour of one Abdul Azeez Sahib The trial Court has noticed that the evidence of D Ws. 1 and 2, that is, Muthuvelu Pillai and the 2nd defendant, to the effect that Muthuvelu Pillai and his successors-in-title have been in possession and enjoyment of the suit property in their own right as absolute owners from 9th November, 1936, the date of endorsement of discharge, Exhibit B-4, has not at all been challenged in cross-examination in any manner whatsoever by the plaintiff It is observed by the Courts below, that the plaintiff has unequivocally admitted in evidence that he knew fully about Muthuvelu Pillai's possession of the suit property from the date of his purchase in Court-auction and the possession and enjoyment of the property by the transferees from Muthuvelu Pillai, namely, the first defendant and her sister since 1939.

Another fact may be mentioned here While Muthuvelu Pillai was in possession of the suit property, there was an attempt at trespass on the suit property by the plaintiff, his brother Venkataswami and his aunt Salammal and this led to a criminal complaint by Muthuvelu Pillai The plaintiff admits that on this complaint of Muthuvelu Pillai for trespass, each of them was fined Rs 5 Also while it is seen that this Muthuvelu Pillai and subsequently his transferees have been in possession and enjoyment of the entire property asserting absolute title in themselves, it is found by the Courts below that under the Court-auction sale in execution of the decree

against Venkataswami Mudaliar, the interests of the plaintiff did not pass to the Court-auction purchaser. The suit was on a promissory note executed by Venkataswami Mudaliar and the plaint clearly established that the promissory note debt was incurred by Venkataswami Mudaliar in his individual capacity. Muthuvelu Pillai had prayed only for a personal decree against Venkataswami Mudaliar and in the circumstances only the right title and interest of Venkataswami Mudaliar in the suit property could pass to the Court-auction purchaser Muthuvelu Pillai. The finding of the Courts below in this regard is that notwithstanding the fact that the decree-holder had proceeded to bring the entirety of the property to sale and purported to purchase the entirety of the property, the Court-auction sale was not binding on the plaintiff and it could not pass the interests of the plaintiff to Muthuvelu Pillai. Of course, Muthuvelu Pillai had taken possession of the entirety of the property pursuant to the Court-sale and had on redemption entered into possession of the entirety of the suit property.

On these facts, it is contended for the plaintiff that as he is not bound by the sale, his right of redemption is outstanding and he is entitled to redeem and secure possession of his share in the property. It is said that though Muthuvelu Pillai at the Court-auction purchased the entire property subject to the usufructuary mortgage, in law, he acquired only the interests of his brother Venkataswamy and stepping into his shoes, he became a co-mortgagor with the plaintiff. He acquired no higher right by the auction purchase. As a co-mortgagor he was entitled to redeem and get possession of the entire mortgaged property on 6th November, 1936, his possession was in accordance with law in the right of a redeeming co-mortgagor and his possession could not be considered to be adverse to the plaintiff. His Court-auction purchase secured to him only the right, title and interest of the judgment-debtor and nothing more, and his judgment-debtor had only the interests of a co-sharer in the equity of redemption. The stand for the plaintiff to this extent is perfectly justified and correct. Equally the charge and conviction for criminal trespass against the plaintiff his brother and aunt by itself cannot make the possession of Muthuvelu Pillai hostile to the plaintiff. The attempted trespass was in 1937 and Muthuvelu Pillai's possession was in accordance with law in the right of a co-mortgagor who had paid off the entire mortgage amount. Muthuvelu Pillai was in the circumstances entitled to hold on to the property till he was paid as contribution the proportionate part of the mortgage debt and the expenses of redemption by the non-redeeming co-mortgagor plaintiff. When Muthuvelu Pillai as a co-mortgagor redeemed the mortgage, the mortgage as to his half share in the property was extinguished and as to the share of the plaintiff, he stood in the shoes of the mortgagee he had redeemed, *vis-a-vis* the co-mortgagor Muthuvelu Pillai stood subrogated to the rights of the mortgagee who was redeemed—*See* sections 92 and 95 of the Transfer of Property Act. Learned Counsel contended that such being the character of Muthuvelu Pillai's possession the case is governed by Article 148 of the Indian Limitation Act and the plaintiff has 60 years from the date of the mortgage to redeem his half share in the suit property. It was submitted that there has been no redemption by him and that his right of redemption had not been extinguished by any act of his or by any decree of Court to bar him from suing for redemption.

Per *contra*, it was urged for the defendants that Muthuvelu Pillai and after him, his transferees have been openly and notoriously proclaiming against the plaintiff, rights in the entirety of the suit property and that therefore they have prescribed title to the entirety of the suit property by adverse possession. It is this argument that found acceptance at the hands of the learned District Munsif. The learned Subordinate Judge on appeal accepted the contention on behalf of the plaintiff that the plaintiff as one of the mortgagors had 60 years to redeem and he cannot be forced to redeem at an earlier date merely because Muthuvelu Pillai and his transferees were asserting rights putting forward adverse claims. The learned Subordinate Judge was of the view that the plaintiff was not legally bound to sue for possession merely because adverse claim was put forward by Muthuvelu Pillai and his transferees. Reliance was placed by the learned Subordinate Judge on the decision in *Kelu* v.

Chekkara Cheppan[1], and this decision is now again pressed for the plaintiff. It is observed in that case as below :

> "When a person who is not a mortgagor, under a mistaken claim, pays off a mortgage debt, he cannot extinguish it ; for he has no right to do so. The only person who can extinguish a mortgage, is the person who is entitled to redeem that mortgage and merge the mortgage in his own rights of mortgagor or mortgagee."

Learned Counsel for the plaintiff lays considerable stress on this observation. But I fail to see its application to the facts of the present case. That is a case of a person in the *bona fide* belief that he was entitled to redeem, redeeming the mortgage. In that case it is observed that when a person believes that he was entitled to redeem the mortgage either under the impression that he was a mortgagor or that he had some other right in the property which would entitle him to redeem, on payment he would be entitled to the rights of the mortgagee by way of subrogation or a like equitable principle. But on such payment the mortgage debt as such was not extinguished. It is also observed examining the question of adverse possession by the person so redeeming, that the mere assertion by a person in possession of the property when the mortgagor had no immediate right to possession, which was not coupled with some act definitely interfering with the rights of the mortgagor, would not amount to an ouster of the mortgagor, that would force him to take some immediate action under pain of losing rights to the property by adverse possession. It was held in that case that a mortgagor who had 60 years to redeem could not be forced to redeem at an earlier date, merely because someone was asserting adverse claims to the property It is said that the correct test applicable in these cases is whether the possession and acts of the person claiming adversely can be referred to any legal right that he possessed Submissions were made based on this decision and other decisions were also referred to for contending that Muthuvelu Pillai and the transferees from him must be looked upon only as mortgagees.

The facts of this case are not so simple for the application of the decision in *Kelu* v. *Chekkara Cheppan*[1]. It may be that if possession had continued in Muthuvelu Pillai, the plaintiff could rely on Article 148 of the Limitation Act and claim full 60 years, from the date of the mortgage. But here Muthuvelu Pillai had conveyed the entirety of the property, as absolute owner, even in 1939 under Exhibit B-11, dated 24th January, 1939 in favour of Unnamalai Ammal, the first defendant and her sister Rajammal Unnamalai Ammal and Rajammal had entered on the property as absolute owners and admittedly to the knowledge of the plaintiff they have been asserting rights in the property as owners. The suit was filed only on 22nd November 1960 From 1939 the first defendant and her sister have been enjoying the property as owners. After 20 years of enjoyment, Rajammal conveys her half share in the property under two sale deeds, Exhibits B-12 and B-13, one in 1959 and another in 1960 to the present 2nd defendant In my view whether Article 144 of the Limitation Act could be availed of or not by the defendants, clearly Article 134 of the Indian Limitation Act will apply. Under Article 134 of the Limitation Act, a period of 12 years is provided for a suit to recover possession of immovable property mortgaged and afterwards transferred by the mortgagee for valuable consideration, the period commencing to run from the date when the transfer becomes known to the plaintiff The decision in *Kelu* v. *Chekkara Cheppan*[1], distinguishes the case therein under consideration from cases to which Article 134 is applicable. My attention was drawn by the learned Counsel for the plaintiff to the decision in *Karuppanan Servai* v *Deivasigamania Pillai*[2] This again does not help the plaintiff, but on the contrary it is a decision directly in favour of the defendant Learned Counsel for the plaintiff relied on the observations in that judgment to the effect :

> "The transfer by the mortgagee as owner does not operate as a discharge of the mortgage by the mortgagor and the transferee is entitled as against the mortgagor at least to what his transferor was entitled. If he is then entitled as against the

1. A.I R 1937 Mad 451. 2 I.L.R (1954) Mad 664 (1954) 2 M L J. 12.

mortgagor to the rights of the original mortgagee, is he not also subject to the obligations of his transferor in favour of the mortgagor ? The real question in such cases is not what the transferee purported to acquire, but what in fact he did acquire and if what he did acquire was only the interest of the mortgagee, he is liable under the law to be deemed as a mortgagee and Article 148 will apply ".

But proceeding, their Lordships have discussed the relative scope of Articles 134 and 148 and it is observed :

" If the defendant is under liability to be redeemed under Article 148, he is also entitled to the protection afforded by Article 134 "

The question now under consideration is whether the defendants could claim the benefit of Article 134 and whether the requirements of that Article are satisfied. As pointed out in the said decision at page 20,

" To understand the true scope of Article 134 it is necessary to read it along with Article 148. Article 148 provides a period of 60 years for redemption of a mortgage and Article 134 cuts down that period to 12 years when there is a transfer by the mortgagee. Article 134 is, therefore, an exception to Article 148. In both the Articles the same word 'mortgagee' is used. It must clearly have the same meaning in both the Articles. If 'mortgagee' in Article 148 should mean only the original mortgagee, then the present action for redemption of Exhibit P-1 would not be maintainable as against the defendant who is purchaser from Balaguru. But if 'mortgagee' in Article 148 includes all persons who succeed to the interest of the mortgagee, it must bear that meaning under Article 134 as well and the appellant will be entitled to its benefit. If the defendant is under liability to be redeemed under Article 148, he is also entitled to the protection afforded by Article 134 Likewise, the right of a mortgagor to redeem under Article 148 is subject to the bar enacted in Article 134 in favour of a transferee."

In that case while the Court-auction purchase by which Balaguru Naidu become entitled to the property was held not to confer the protection of Article 134, the transfer under Exhibit D-14 by Balaguru which purported to convey the full title with land to the purchaser was held to be a transfer within the meaning of Article 134, and a finding was called for whether the plaintiff or his predecessor-in-title who had instituted the suit for redemption had knowledge of the conveyance by Balaguru and, if so, was it more than 12 years prior to the suit. It was held that the conveyance in question which purported to transfer all the property absolutely and not a mere assignment of the mortgage would fall within the scope of Article 134 and on the finding received that the plaintiff and his predecessor-in-title had knowledge of the transfer more than 12 years prior to the institution of the suit, the claim for redemption was dismissed.

If the plaintiff in this case would look upon Muthuvelu Pillai as in the position of a mortgagee and rely on Article 148, the defendants could well plead, as held in the above decision, on the facts of the case, that the period provided under Article 148 was cut down by Article 134. The learned Judges in the above case referred with approval to the observations of Seshagiri Ayyar, J , in *Muthaya Shetti* v. *Kanthappa Shetti*[1] that Article 134 is really a branch of the law of prescription and the reason for giving the protection of the statute of repose is weightier in the case of the transferees from representatives of the mortgagee than in the case of transferees from the original mortgagee. The defendants referred in this connection to the decision in *Rukku Shetty* v. *Ramachandraya*[2] which is referred to in *Karuppannan Servai* v. *Deivasigamania Pillai*[3]. In this case Article 134 was applied to a case where a mortgagee in possession transferred the property under a sale deed for consideration to another and put him in possession and what was bargained for by the transferee was an absolute sale though he knew that the transferor had only a mortgagee's interest,

1. (1915) 34 M.L.J 431
2. (1925) 49 M.L.J. 634 : I.L.R. 49 Mad. 29.
3. (1954) 2 M.L.J. 12 : I.L.R. (1954) Mad. 664.

on a suit instituted by the mortgagor. In *Nani Bai* v. *Gita Bai*[1] it is said by the Supreme Court :

"Article 134 of the Limitation Act contemplates a sale by the mortgagee in excess of his interest as such The Legislature, naturally, treats the possession of such transferees as wrongful, and therefore, adverse to the mortgagor, if he is aware of the transaction Hence the longer period of 60 years for redemption of the mortgaged property in the hands of the mortgagee or his successors-in-interest, is cut down to the shorter period of 12 years' wrongful possession, if the transfer by the mortgagee is in respect of a larger interest than that mortgaged to him. In order, therefore, to attract the operation of Article 134, the defendant has got affirmatively to prove that the mortgagee or his successor-in-interest has transferred a larger interest than justified by the mortgage If there is no such proof, the shorter period under Article 134 is not available to the defendant in a suit for possession after redemption "

The requisite proof is clearly available to the defendants before me. For the defendants, reliance is also placed on the decision in *Palanithurai Mudikondar* v *Veerappa Thevar*[2], where Article 134 was applied to a case where the successors-in-interest of the original mortgagee claiming absolute interest in the properties mortgaged purported to transfer full ownership thereof to the transferee It is not necessary to refer to all the decisions relied on by the plaintiff or for the defendants Learned Counsel for the plaintiff drew my attention also to the decision of a Full Bench of this Court in *Valliamma* v *Sivathanu*[3] where again it is pointed out that while a redeeming co-mortgagor has a period of 12 years under Article 132 of the Limitation Act for recovery from his other co-mortgagors, the aliquot share of the mortgage money, there should be a corresponding right in a non-redeeming co-mortgagors to obtain possession of the properties on payment of their share of the mortgage money within that period. The following observations in the Full Bench were referred to .—

" It will be plain that there will be two periods within which a non-redeeming mortgagor can obtain his property from his co-mortgagor who had redeemed, the first is based on the rule of subrogation and the second is corrlative obligation in the redeeming co-mortgagor to give up the property belonging to his co-mortgagor on being paid the money due by him In the former case where the mortgage is possessory the period of limitation will be governed by Article 148. . . . and the starting point for limitation will be the same as for the original mortgage redeemed In the latter case, the non-redeeming co-mortgagor will have a period of 12 years from the date of redemption of the original mortgage by the other co-mortgagor It will be open to the non-redeeming co-mortgagor to take advantage of any one of these periods whichever is to his advantage ".

These observations cannot help the plaintiff in this case as the persons in possession who have to be dispossessed by the plaintiff are not redeeming co-mortgagors but transferees from him who claim under conveyances by the redeeming co-mortgagor of the entirety of the property as if he had absolute title to the property. It is this transfer in this case that attracts Article 134 of the Limitation Act.

Reference may be made to the Full Bench decision of our High Court in *Rukmini Ammal* v *Venkatarama Iyer*[4] In that case one of the co-mortgagors in two *othi* mortgages purported to sell the entire mortgagor's interest to a third party who filed a suit for redemption of the mortgages. After the third party filed the suit for redemption and after he secured possession, the other co-mortgagor filed a suit for redemption, partition and separate possession of his half share in the properties and the question that arose for consideration was the plea of limitation The purchaser who redeemed the entirety of the properties relied on Article 144 of the Limitation

1. (1958) S C J 925 (1959) S C R 479 A.I.R. 1958 S.C. 706.
2. I.L R. (1965) 2 Mad. 427 (1965) 1 M L J. 614.
3. I L R (1963) Mad 1110 (1964) 1 M L J 161 A I R 1964 Mad 269
4. I L R. (1964) 1 Mad 530. (1964) 2 M L.J. 1 : A.I.R. 1964 Mad. 281.

Act. There was no further transfer in that case and the person in possession who was sought to be redeemed had acquired possession of the property only on redemption. It was observed :

> " A claim by a non-redeeming co-mortgagor to recover his share of the mortgage property from the redeeming co-mortgagor who came into possession of it on redemption, can be made on payment of his share of mortgage amount, costs of redemption etc. No right to possession exists without such payments as under the law the redeeming co-mortgagor is subrogated to the rights of the original mortgagee ; the co-mortgagors' suit even if it be for possession will in substance be only for redemption ... ...
> Therefore, the period of limitation applicable for redemption by the non-redeeming co-mortgagor of his share of the property will be the same as that for redemption of the original mortgage."

In that decision the Court did not rule out the possibility of adverse possession and the applicability of Article 144 even in such cases, but on the facts of the case, held that there was no ouster of the non-redeeming co-mortgagor by the other party. In fact they observed :

> " This does not mean that there could be no adverse possession with regard to a share in an equity of redemption. What all we say is that there is nothing in the present case beyond the notice, dated 23rd September, 1924 to show that the first respondent's father had prescribed any title by adverse possession to a half share in the equity of redemption possessed by the other mortgagor."

In the absence of ouster or adverse possession, a preliminary decree for redemption was granted.

In the present case, if the plaintiff would have the suit as one for possession on redemption and rely on Article 148, in its wake, it will draw in Article 134. If the plaintiff would look upon Muthuvelu Pillai as mortgagee for purposes of Article 148, the persons claiming under him, would be transferees from him for purposes of Article 134 There is no dispute that in this case Muthuvelu Pillai had transferred a larger interest than what he acquired in law under the Court auction purchase in execution of the decree against his mortgagor. As a matter of law, the Courts below have found that the interest of the plaintiff in the property had not been transferred by the Court-auction sale to Muthuvelu Pillai. It is admitted by the plaintiff that he has been aware of the transfer by Muthuvelu Pillai and the possession of the defendants following such transfer On the evidence it is clearly made out that for over 20 years to the knowledge of the plaintiff, the transferees from Muthuvelu Pillai have been in enjoyment of the property in assertion of ownership of the enitrety of the property It follows that the plaintiff's suit for redemption has to fail under Article 134 It is not necessary to consider the defence based on Article 144 of the Limitation Act. If Article 144 is applied, even then, clearly the action is barred.

In the result, the Second Appeal is allowed, the decree and judgment of the lower appellate Court are set aside and that of the trial Court dismissing the suit restored. Having regard to all the circumstances, the parties will bear their respective costs throughout.

No leave.

S.V.J. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. S. RAMAKRISHNAN.

K. P. Abdulla & Bros., by its partner K. P. Ummar .. *Petitioner*.*

v.

The Check-Post Officer, Kandai Goundan Chavadi, Coimbatore and another .. *Respondents.*

Madras General Sales Tax Act (I of 1959), section 42 (3)—Power to seize and confiscate goods under—Validity.

It is urged that the various provisions of section 42(3) Madras General Sales Tax Act including the two provisos thereto are *in pari materia* with section 41 (4) and its provisos and that consequently the reasoning adopted by the Supreme Court in the case reported in *Commissioner of Commercial Taxes* v. *R S. Jhaver*, (1967) 20 S.T.C 453, should be applied to strike down section 42 (3) also. But there is a sharp and clearly marked distinction between the two sections which can be illustrated by taking the circumstances of the present case into consideration. The taxable event, in the case of the goods in the instant case had been completed, whether at the point of first sale or at the point of subsequent sale according to the nature of the goods. There is therefore, no difficulty in the present case to levy the tax payable as well as the penalty because the tax had become exigible. Hence the narrow ground on which the Supreme Court relied for striking down the corresponding provisions in section 41 does not exist in this case which arises under section 42.

Nor can the attack on section 43 (2) be sustained on the reasoning adopted in the case reported in *R. S. Jhaver* v. *Commissioner of Commercial Jaxes*, (1965) 16 S.T.C. 708, since the facts here indicate that a sale of the goods had taken place and it was open to the authorities to take the view that the clandestine features in the transport of the goods across the State borders, indicated a clear intention on the part of the dealer to suppress information about the sales in collusion with the seller. In such circumstances, it can be held that the power to seize and confiscate is ancillary to the power to levy tax conferred on the State Legislature, as it empowered the authorities to take reasonable steps to ensure that the tax is not evaded.

Petition under Article 226 of the Constitution of India, praying that in the circumstance stated therein, and in the affidavit filed with W P. No. 1104 of 1965 on the file of the High Court, the High Court will be pleased to issue a writ of *certiorari* in W P. No 1104 of 1965 calling for the records of the Check-Post Officer, Kandai Goundan, Chavadi, Coimbatore in O.R No 3096 of 1964-65, dated 2nd March, 1965 levying a penalty of Rs. 1,000 in lieu of confiscation, and to issue a writ of *mandamus* directing the (first) Respondent herein to re-deliver 45 bags of maida, 20 bags of atta and 20 bags of khandasari sugar in the possession of the (first) Respondent belonging to the petitioner herein in pursuance of the said order of the first Respondent herein and to quash the same.

K. Srinivasan and *K. C. Rajappa*, for Petitioner.

The Special Government Pleader for Respondents.

The Court made the following

ORDER.—The petitioner in these two writ petitions K. P. Abdulla & Bros., by its partner is a general merchant at Court Road, Calicut. The Respondent is the Check-Post Officer, Kandai Goundan Chavadi, Coimbatore, which is on the border of Coimbatore District in the Madras State and Calicut in the Kerala State. The prayer in W.P. No. 1104 of 1965 is for the issue of a writ of *certiorari* under Article

*W.P. Nos. 1104 and 1154 of 1965. 21st December, 1967.

226 of the Constitution quashing the order of the respondent, dated 2nd March 1965 levying on the petitioner a penalty of Rs. 1,000 in lieu of confiscation of goods passed under section 42 (3) (*a*) of the Madras General Sales Tax Act, 1959. The prayer in W.P No. 1154 of 1965 is for the issue of a writ of *mandamus* to the respondent directing re-delivery of 45 bags of maida, 20 bags of atta and 20 bags of khandasari sugar belonging to the petitioner and which are in the possession of the respondent The two writ petitions are connected, because the penalty, the subject matter of W P. No 1104 of 1965, was imposed in lieu of confiscation of the goods mentioned in W.P No 1154 of 1965

The affidavit of the petitioner, reveals the following facts The petitioner is as partnership firm carrying on business in foodgrains, wheat products etc, in Calicut In the course of its business it purchased from firms at Madras 85 bags of atta and 45 bags of maida, and purchased from a dealer at Nellore 20 bags of khandasari sugar, the total amounting to 150 bags It was proposed to transport them in a lorry of United Transport Service, Madras, from Madras State to the petitioner's place of business at Calicut. But only 85 bags could be loaded in lorry KLR 3919 but the remaining 65 bags could not be loaded and despatched at the same time because the load was not sufficient for a full lorry Unfortunately the delivery note and the sale bill, which were entrusted by the booking clerk of the lorry office to the driver of the lorry KLR 3919, related to the purchase of 85 bags of atta, while in fact what was loaded in the lorry was 45 bags of maida, 20 bags of atta and 20 bags of khandasari sugar. When the lorry reached the respondent's check-post on its way to Calicut, the Check-Post Officer, after check, became suspicious on account of the fact that the sale bill and the delivery note which the lorry carried mentioned only 85 bags of atta whereas the actual goods found in the lorry comprised of maida atta and khandasari sugar, without any sale bill or delivery note for the maida and khandasari sugar There were also at the time some restrictions on the transport of sugar and maida, which made it necessary for obtaining a permit from the Civil Supplies Department before the said articles could be transported. But such a permit was not carried in the lorry. In the above circumstances, the respondent took possession of the goods and issued a notice to the petitioner to show cause against confiscation and pay a penalty of Rs 1,000 in lieu of confiscation. The petitioner submitted that he had really obtained sale bills for the purchase of maida and sugar from the respective merchants, but by mistake only the sale bill and delivery note for atta were sent with the lorry driver without sending the sale bills for sugar and maida. He also pleaded that the maida purchased was in the open market and that khandasari sugar was purchased in Andhra Pradesh and therefore no permit from the Civil Supplies Department was necessary for their transport. But the respondent did not accept the explanation of the petitioner and passed the order mentioned above. He relied upon the circumstance that even though the driver might be ignorant of the real state of affairs, an employee of the petitioner, who was present in the lorry at the time of transport could have explained the alleged real position at the time of check at the check-post But that was not done, and the respondent considered that the explanation subsequently furnished to the show cause memo was an afterthought and that what was really attempted was to suppress the sales of the maida and sugar under the cloak of the sale bill and delivery note for atta only.

The petitioner in these writ petitions has not disputed the correctness of the facts stated above, as to what happened at the check-post, nor can he press this Court while exercising writ jurisdiction for giving a decision that the finding of the Check-post Officer that the explanation submitted by the petitioner is not acceptable and should be reversed, because such a decision will fall within the jurisdiction of a tribunal of appeal But the petitioner's learned Counsel relied upon a decision of a Bench of this Court reported in *R. S. Jhaver* v *Commissioner of Commercial Taxes*[1] where the Bench, dealing with section 41 of the Madras General Sales Tax Act, held that section 41 (4) providing for seizure and confiscation of goods was illegal and

1. (1965) 16 S.T C. 708

ultra vires Learned Counsel urged that the provisions for seizure and confiscation in section 42 (3) of the Act and the provision for levy of penalty in lieu of such confiscation in section 42 (3) Second Proviso, are identical to similar provisions in section 41 (4) of the Act, and for the same reasons as were adopted by the Bench of this Court in the decision cited above, the seizure and confiscation in the present case should be declared illegal and the goods directed to be restored to the petitioner and the penalty order annulled.

It appears to me that there are substantial differences between section 42 and section 41, and these differences have to be taken into account for dealing with the argument mentioned above. Section 41 (4), when it confers on the officers of the Commercial Taxes Department the power to search, seize and confiscate goods found in any office, shop, godown, vessel, vehicle or place of business of a dealer, but not accounted for by the dealer in his accounts, confers a wide power. There was room to entertain a serious doubt as to whether that power could be considered as ancillary to the power to levy tax on the sale or purchase of goods conferred on the State Legislature under Entry 54 of List II of the Seventh Schedule of the Constitution. If the presence of the goods in the premises etc , of a dealer without its being brought into the accounts, could lead to the legitimate inference that a sale or purchase had taken place in respect of the goods, without its being properly accounted, for, there may be room to hold that the power to seize and confiscate such goods is ancillary to the power to tax the sales. In that contingency, it can be viewed as a penal measure to discourage the dealers from suppressing such transactions and evading tax, and therefore within the ambit of Entry 54 Veeraswami, J., who delivered the judgment of the Bench in the decision above cited, however, took the view recorded at page 734 of the report :

> " A provision requiring maintenance of correct stock accounts of goods for purposes of Sales Tax is understandable. But we are unable to see how a power of seizure and confiscation of goods is or can be ancillary or incidental to the power to tax the sale or purchase of goods even from the standpoint of checking evasion or making evasion unprofitable. The Act is not a law on goods. No such law can be made under the guise of Entry 54, List II, of the Seventh Schedule "

The learned Judge thereafter held that sub-section (4) of section 41 in so far as it provided for such a power was not within the ambit of Entry 54 and was neither ancillary nor incidental thereto and was incompetent and invalid.

The Andhra Pradesh High Court, however, in a decision reported in *Papanna* v. *Deputy Commercial Tax Officer*[1] arrived at a diametrically opposite conclusion and held that the power to seize and confiscate goods is only by way of punishment or penalty which is intended to operate as the most effective deterrent against tax-evaders and it is therefore ancillary or incidental to the power to levy tax on the sale of goods and falls within the ambit of Entry 54 of List II of the Seventh Schedule. The Andhra Pradesh High Court purported to follow a Mysore High Court decision and differed from the decision of this Court. The point came before the Supreme Court in a decision in *Commissioner of Commercial Taxes* v. *R S. Jhaver*[2], which was an appeal from the Madras High Court decision in *R S. Jhaver* v. *Commissioner of Commercial Taxes*[3]. At pages 465 of the report, the Supreme Court, after referring to the conflicting views of the various High Courts, stated that they did not propose to decide the general question as to whether a power to confiscate goods which were found on search and which were not entered in the account books of the dealer was an ancillary power necessary for the purpose of stopping evasion of tax. They proceeded to deal with the matter before them, namely, the *vires* of section 41 (4) of the Act, from an altogether different point of view. Their approach was to treat the power to levy the tax payable, as well as a penalty in the Second Proviso of section 41 (4), as inseparable from the power to seize and confiscate conferred under

1. (1967) 2 An W R. 71 (1967) 19 S T.C. 506
2. (1967) 20 S.T.C. 453.
3. (1965) 16 S.T.C 708.

the main part of section 41 (4). The Second Proviso of section 41 (4) was worded thus " in cases where the goods are taxable under this Act, in addition to the tax recoverable, a sum of money not exceeding one thousand rupees " In the view of their Lordships of the Supreme Court the above proviso implied that tax had to be ordered to be recovered even before a sale has taken place in addition to the levy of penalty They remarked that in the majority of cases under the Act recovery of tax is provided at the point of first sale in the State, and that therefore, the provision for recovery of tax in addition to penalty contained in the Second Proviso to section 41 (4), was clearly repugnant to the general scheme of the Act. Since this Second Proviso and the power to seize and confiscate are not severable, from the rest of sub-section (4), sub-section (4) with the two provisos thereto must fall on the narrow ground stated above The Supreme Court struck down sub-section (4) of section 41 for reasons different from those which commended themselves to this Court in *R S Jhaver* v. *Commissioner of Commercial Taxes*[1].

What the learned Counsel for the petitioner urges before me is that the various provisions of section 42 (3) including the two provisos thereto are *in pari materia* with section 41 (4) and its provisos, and that consequently the reasoning adopted by the Supreme Court should be applied to the power of seizure and confiscation conferred under section 42 of the Act But there is a sharp and clearly marked distinction between the two sections which can be illustrated if we take the circumstances of present case into consideration. Here even according to the case of the petitioner the maida and atta had been sold in Madras State and the sugar in the Andhra State, before the transport. The petitioner is a Calicut dealer and the goods when they were checked at the check-post after the aforesaid purchases were on their way to Calicut across the State borders. There is, therefore, no doubt that the taxable event had been completed in the case of these goods, whether at the point of first sale or at the point of a subsequent sale according to the nature of the goods. Therefore, there is no difficulty in the present case to levy the tax payable, as well as the penalty, because the tax had become exigible Therefore the narrow ground on which the Supreme Court relied for striking down the corresponding provisions in section 41 does not exist in this case which arises under section 42. Learned Counsel for the petitioner contends that since the Supreme Court has not held specifically that the reasons given in the decision of the Bench of this Court in *R.S. Jhaver* v *Commissioner of Commercial Taxes*[1], are not valid it will be open to this Court to adopt those reasons wherever they apply. From this point of view also, I am of the opinion that the attack on section 42 cannot be sustained since the facts indicate that a sale of the goods had taken place even according to the admission of the petitioner It was open to the authorities to take the view that the clandestine features in the transport in this case, indicated a clear intention on the part of the petitioner to suppress information about the sales in collusion with the seller in Madras (or Nellore). In such circumstaces it can be held that the power to seize and confiscate is ancillary to the power to levy tax, as it empowered the authorities to take reasonable steps to ensure that the tax is not evaded. Therefore, these writ petitions must fail and are dismissed. No order as to costs.

V.K. *Petitions dismissed.*

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1. (1965) 16 S.T C 708.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE T. VENKATADRI.

Kubera Press by its Proprietor, K. Sivaraman .. *Petitioner**

v.

The Regional Provident Fund Commissioner, Madras .. *Respondent.*

Employees Provident Fund Act (XIX of 1952), *sections* 1 (3) *and* 16—*Original printing press under the Provident Fund Scheme—Petitioner purchasing the Press from the person who purchased it during its winding up in liquidation—The latter, not a member of the scheme—Petitioner employing new workers—Petitioner's press if an infant industry entitled to protection under section* 16.

After the original printing press, a member of the Provident Fund Scheme, went into liquidation, the same was purchased in the course of winding up by one *P.P.* He was not a member of the scheme. The petitioner purchased the machinery and fittings and started a new press employing new workers In such circumstances, in law, it cannot be said that it is a continuation of the old firm. On the other hand, indications are that it is setting up of an establishment afresh. Therefore, the petitioner-press as an infant industry is entitled to protection under section 16 of the Employees Provident Fund Act.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records of the Respondent in C/MD/561, Regl., dated 12th April, 1965 and to quash the proceedings therein.

K. N. Balasubramaniam, for Petitioner

S Ramasubramaniam, for Respondent.

The Court made the following

ORDER.—The petitioner in this writ petition is the Kubera Press represented by its proprietor, K. Sivaraman The writ petition is for the issue a writ of *certiorari* to call for the records of the Regional Provident Fund Commissioner, Madras, in C/MD/561 Regl, dated 12th April, 1965 and quash the order dated 12th April, 1965.

The case of the petitioner is that originally the printing press which commenced in 1949 was run by one Ch Subba Rao The printing press went in to voluntary liquidation in 1960. As the Company was a member of the Provident Fund Scheme and was submitting returns, when it went into voluntary liquidation and the employees were discharged, they were paid all the arrears of provident fund and the account with the Provident Fund Commissioner was also closed. In the course of winding up, one Puram Prakasa Rao purchased the Press and he was running the same. He was not a member of any Provident Fund Scheme and he was not submitting any returns to the Regional Provident Fund Commissioner Nor was he asked, it is stated, to submit any return to the Commissioner. In the year 1961, the petitioner purchased the printing machinery and fittings from the said Puram Prakasa Rao. The Regional Provident Fund Commissioner asked the petitioner in 1964 to pay contribution to the Provident Fund Scheme, of a sum of Rs. 3,200 In this writ petition, the petitioner questions the propriety of the order passed by the Regional Provident Fund Commissioner

Learned Counsel for the petitioner submitted that the petitioner-press was an infant industry entitled to protection under section 16 of the Employees Provident Fund Act, and that the provisions of section 1 (3) of the Act could not be extended to it. Learned Counsel for the respondent no doubt, relied on two decisions of this

* W.P No 1937 of 1965 29th January, 1968.

Court. In *M/s R L Sahni and Co* v. *Union of India*[1], it was held that where an establishment, such as a factory, has been set up and the owner of the Factory does not run the business on his own but chooses to lease the Factory from time to time, every fresh lease cannot give rise to the setting up of the Factory afresh I think that case can easily be distinguished from the present case. That was a case of lease. But in the present case, the original printing press went into voluntary liquidation and in the course of winding up of the press, it was purchased by Puram Prakasa Rao. He was not a member of the Provident Fund Scheme. The petitioner purchased it from Puram Prakasa Rao In the same case, the learned Judge has observed that under the provisions of section 16 of the Act, establishments which come into existence for the first time are granted protection for a certain period to enable them to attain financial stability. In the other case, *Devi Press* v. *Regional Provident Fund Commissioner, Madras*[2], a limited company which was running a printing press went into voluntary liquidation prior to 1957 and the dispute between the workers and the management as a result of the winding up and closure was settled by an agreement that all the workers except those in the binding department would be re-employed by the new management. The concern was taken over by a firm of registered partnership. It was held that the old establishment must be deemed to have continued although in a different name when it was taken over by the partnership. That case can also be distinguished In that case, the old employees continued in the partnership firm also. In the instant case, the original printing press went into liquidation That printing press was a member of the Provident Fund Scheme. But in the course of the winding up, it was purchased by Puram Prakasa Rao He was not a member of the Scheme. The petitioner purchased the machinery and fittings and started a new press employing new workers In such circumstances, in law, it cannot be said that it is a continuation of the old firm. On the other hand, indications are that it is setting up of an establishment afresh. The petitioner is therefore, entitled to protection under the Act.

The Writ Petition is accordingly allowed. There will be no order as to costs.

V.M.K. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI.

Mahomed Ebrahim & Co (Private), Ltd. .. *Petitioner**

v.

Sridhar & Co. .. *Respondent*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10 (3) (a) *Second Proviso and section* 10 (3) (c)—*Scope of—Landlord's application for eviction originally filed under section* 10 (3) (a) *for eviction of tenants on the ground of owner's need—Some of the tenants vacating during the pendency of the proceedings—Landlord's application—If should be treated as under section* 10 (3)(c) *for additional accommodation—Other tenant if can resist the application as barred under the Second Proviso to section* 10 (3) (a).

Where a landlord files separate applications for eviction of tenants from his premises under section 10 (3) (*a*) (*iii*) of the Rent Control Act on the ground that he requires the entire premises *bona fide* for his own business purposes and if on the date of the applications he was not in occupation of any portion of the premises, his application should be treated as falling only under section 10 (3) (*a*) of the Act When once a landlord obtains possession of a building under this provision he is debarred from applying again under the same provision for obtaining possession of another building of his own That is the only effect of the Second Proviso to section 10 (3) (*a*) of the Act. Section 10 (3) (*c*) of the Act will apply only to cases where the landlord is already in occupation of a part of the building in respect of which eviction proceedings are instituted

1 (1964) 2 M L J 191
2. I L R. (1965) 2 Mad 99 78 L W 167

*C R P. No. 1774 of 1966 19th July, 1967.

If a landlord files separate eviction petitions against each of the different tenants in occupation of a building and during the pendency of one such application he obtains possession of parts of the building from one or more of the tenants who are respondents in other applications, by no stretch of imagination can it be said that the applications which remain to be disposed of is one filed again by the landlord within the meaning of the Second Proviso to section 10 (3) (*a*) of the Act The proviso cannot bar the relief to the landlord in such circumstances nor is there anything in the section to warrant the view that the landlord's application in such circumstances, should be viewed as one falling under section 10 (3) (*c*) of the Act for additional accommodation.

Petition under section 25 (1) (*a*) (ii) of the Madras Act XVIII of 1960 praying the High Court to revise the order of the Court of the Small Causes (Third Judge), Madras, dated 24th March, 1966 and made in H R A No. 632 of 1965 (H R C. No. 842 of 1963-I Additional Rent Controller, Madras)

V Srinivasa Iyer and *K Raman*, for Petitioner.

V. Thyagarajan, for Respondent

The Court delivered the following

JUDGMENT —This Petition is to revise the order of the Third Judge of the Court of Small Causes by which he allowed the appeal by the tenant and dismissed the petition filed by the landlord for eviction The landlord, who is the petitioner in this Court, purchased on 22nd November, 1961 the premises bearing Nos 11/A-1 and 11/A-2 for a sum of Rs three lakhs The petitioner is a private limited company carrying on its business at Nos 7 and 8, Mount Road, Madras, in electrical goods, radios, tape recorders and other goods In has a branch at upstairs of Nos 26 and 27 Rattan Bazaar, Madras, besides a godown behind the Life Insurance Corporation Building in Mount Road. All these buildings have been taken on lease on heavy rents by the petitioner for the purpose of its business It appears the rent for the premises Nos 7 and 8, Mount Road, known as Victory House, was Rs 2,000 per mensem and since 1964 it has been increased to Rs 2,500 per mensem. At the time of the purchase of the premises Nos 11/A-1 and 11/A-2, Mount Road there were three tenants, Royal Printing Works, My Coffee Bar and Sridar & Co. The last of the tenants is the respondent before me On the ground that its business had expanded enormously and that it required the premises for its occupation to carry on its business, the petitioner applied separately for eviction of the Royal Printing Works and the respondent and instituted a suit against My Coffee Bar in ejectment since having regard to the quantum of monthly rent it was paying for the portion in its occupation, the tenancy was, as the law stood then, outside the purview of the Madras Buildings (Lease and Rent Control) Act, 1960 Subsequently when the law was amended and the tenancy of My Coffee Bar came within the purview of the Act, the petitioner withdrew the suit and filed an eviction petition against My Coffee Bar. It is common ground that on 28th March, 1963 an eviction order was passed by the Rent Controller against the Royal Printing Works About four months thereafter, a major portion of the part of the premises in the occupation of the Royal Printing Works was taken possession of by the petitioner. The petition against My Coffee Bar was dismissed by the Rent Controller in June 1965 and the landlord's appeal failed in March, 1966 But the civil revision petition against the appellate order ended in a compromise on 14th March, 1967, My Coffee Bar consenting to an eviction order. So far as the Petition against the respondent was concerned, it had a chequered career It was strenuously resisted by the respondent One of its objections was that during the pendency of the petition, the petitioner having taken possession of a portion of the premises from the Royal Printing Works, it was no longer entitled to maintain the petition as it ought to apply for eviction only on the ground that it required additional accommodation. The Rent Controller overruled this specific objection on the ground that the matter should be viewed as on the date of the petition for eviction and not in the light of subsequent events.

He also found that the petitioner did not own any building of its own in the city for carrying on its business, that its business had expanded manifold since 1937, the turnover amounting to as much as about Rupees sixty-nine lakhs for the year ended 31st March, 1963 and that, in the circumstances, the requirement by the landlord of the premises for carrying on its business was *bona fide* An eviction order was passed and it was contested by the respondent in an appeal under the provisions of the Act The appellate Court came to the opposite conclusion, reversed the order and remitted the petition for fresh disposal, directing the Controller to do so viewing the petition as one for eviction on the ground that the petitioner required additional accommodation for the purpose of its business. The appellate Court took the view that, as the petitioner had during the pendency of the eviction petition, taken possession of a portion of the part of the premises in the occupation of the Royal Printing Works, this made a difference to the continued maintainability of the petition for eviction, but the petition could, nevertheless, be disposed of afresh regarding it as one for additional accommodation. On that view, the appellate Court did not record its final opinion on the question of *bona fides* and requirement by the petitioner of the premises for carrying on its business. Against that order the petitioner filed C R P No. 465 of 1965 which was dismissed by Anantanarayanan, J , as he then was, on 19th March, 1965 The petition against the respondent was taken up again and allowed by a different Rent Controller on 16th June, 1965 He found that the premises Nos. 11/A-1 and 11/A-2 structurally constituted a single integral building and that the petitioner not owning any building for the purpose of its business in the City and its business having enormously expanded in recent years, *bona fide* required additional accommodation for the purpose of its business. He felt that the hardship to the respondent would not outweigh the advantage that would accrue to the petitioner by that order, and ordered eviction. The Rent Controller carefully scrutinised the evidence on the question of *bona fides* and was of opinion that the petitioner was *bona fide* in its requirement of additional accommodation The respondent appealed from that order and succeeded Once again the appellate Court differed from the findings of the Rent Controller It observed that it was not satisfied that there was really need for additional accommodation for the petitioner, as it was already in possession of rented premises in various places of a total extent of about 10,000 sq. ft. It thought that a general increase in the turnover by itself would not show that the petitioner was in need of additional accommodation It was inclined to think that the petitioner purchased the premises as an investment or in the alternative, to demolish the building and construct a new one, and its object in seeking eviction was apparently to get a higher rent Lastly, it was of opinion that it was difficult for the respondent to get alternative accommodation for its business and therefore, the balance of advantage to the petitioner and the hardship to the respondent was in favour of the latter. The present petition is directed against this appellate order

It is contended for the petitioner in this Court that the landlord's application for eviction was wrongly disposed of after the remit order as one under section 10 (3) (*c*) of the Act while it was originally one filed under section 10 (3) (*a*) (*iii*). Alternatively it is said that even on the footing that the petitioner required additional accommodation, the appellate authority failed to make the correct approach. On the other hand for the respondent, it is urged that the petitioner having during the pendency of the eviction petition obtained an order of eviction against another tenant in a portion of the building and taken possession of a part of it, it could only succeed on satisfying the Court that it *bona fide* required the additional accommodation and the conditions of the Proviso to section 10 (3) (*c*) On behalf of the respondent, attention is also invited to clause (*ii*) of the Second Proviso to sub-section (3) (*a*) of section 10 and it is pressed upon me that once the landlord obtained possession of a part of the building, he would not be entitled to apply under section 10 (3) (c) (*iii*) of the Act.

In my view, the main contention for the petitioner is sound and should be accepted The petition for eviction, as originally filed against the respondent, was clearly one under section 10 (3) (*a*) (iii) When it filed it, it was not in occupation of any part of the premises. It could, therefore, only apply for eviction under section 10 (3) (*a*) (iii) That provision enables a landlord to get an order of eviction on the ground that he is not in occupation of any other building of his own for the purpose of carrying on his business, that he required it for the purpose and that the requirement is *bona fide* Once the landlord obtains possession of a building under this provision, he is debarred from applying again under that provision, for obtaining possession of another non-residential building of his own. That is the only effect of clause (*ii*) of the Second Proviso to section 10 (3) (*a*). This is not a case where the petitioner has obtained possession of the whole or part of a non-residential building under section 10 (3) (*a*) (*iii*) and applied again under that very clause for eviction of a tenant from another non-residential building of its own The various clauses of section 10 will have to be read and understood in the context of each other and a comparison of clauses (*a*) and (*c*) of sub-section (3) of section 10 shows that clause (*c*) applies only where a landlord is already in occupation of a part of a building and requires additional accommodation. Clause (*a*) of sub-section (3) of section 10 covers a case of a landlord who is not in occupation of a building or part of it and requires it for his own occupation for the purpose of his residence or of carrying on his business Clause (ii) of the Second Proviso to sub-section (3) (*a*) is inapplicable to a petition for eviction during the pendency of which the landlord takes possession of another building or a part of it by an independent petition, for it is inappropriate to say that the landlord applies again under the same clause for eviction. In my opinion if a landlord files separate eviction petitions against each of the tenants in a building and during the pendency of one, obtains possession of parts of the building from one or more of the tenants, who are respondents in other applications, by no stretch of imagination can it be said that the application which remains to be disposed of, is one that has been filed again by the landlord within the meaning of the proviso. The proviso does not bar such a petition Nor is there anything in the proviso or the rest of the provisions of sub-section (3) (*a*) or clause (*c*) of that sub-section to justify the view that on account of the fact that during the pendency of an eviction petition. possession of a part of the building has been taken, as a result of another eviction petition the petition so pending should, for that reason, be viewed as one under section 10 (3) (*c*) for additional accommodation On that view, the petitioner must succeed

But it is argued for the respondent that the contention is not open to the petitioner in view of the order of Anantanarayanan, J., in C.R.P. No. 465 of 1965 The learned Judge while disposing of the petition referred to the fact that the petitioner had taken possession of a portion of the premises from the Royal Printing Works and observed that in that case proceeding by virtue of the subsequent facts might well be considered as one under section 10 (3) (*c*) of Madras Act No XVIII of 1960 The learned Judge, however, went on to observe:

> "The argument is that this provision does not apply, because the landlord took out comprehensive proceedings for eviction of all the tenants, originally. That again is an argument which could be raised in the Court of the learned Rent Controller. There is no ground for interference in Revision with the judgment directing the remand, and the petition is dismissed "

The last observation shows that the learned Judge did not decide the question but expressly left it open so that it could be raised before the Rent Controller. As I understand the order, the learned Judge was not inclined to interfere in Revision with the order of remit but at the same time did not intend to conclude the point against the petitioner once and for all.

There is no dispute in this Court that the petitioner does not own any other building. The record clearly shows that it is in possession of rented space of a

total extent of about 10,000 to 12,000 square ft. On the evidence on record, there is no doubt that the petitioner has been paying heavy rent. It is equally clear on the materials available that the petitioner's business has expanded manyfold. In the circumstances, there is no reason to suspect the *bona fides* of the petitioner. *Bona fides* in the context have relevance to the honest requirement by a landlord of the premises he has purchased for the purpose of carrying on his business. No oblique purpose of the petitioner in seeking eviction is made out from the evidence The petitioner is, therefore, entitled to an order of eviction under section 10 (3) (*a*) (*iii*).

In any case, I think the petitioner's alternative contention also has force. If the application for eviction is to be regarded as one under section 10 (3) (*c*), it seems to me that the occupation of a part of the building contemplated by that provision is occupation of carrying on the business. There is no evidence on record that the petitioner occupied any part of the premises in that sense Assuming it has, I feel no doubt having regard to the great volume of the petitioner's business, it needs additional accommodation for the purpose of its business. On this matter, the Rent Controller has given very cogent and convincing reasons from which the lower appellate Court could not justifiably differ. On the proviso to clause (*c*) of sub-section (3) of section 10 also, I think the Rent Controller's conclusion on the facts was the correct one

The petition is allowed and the order of the Rent Controller dated 16th June, 1965, is restored Each party will bear its or his costs throughout. Time for eviction, six months

R.M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT —MR JUSTICE P. RAMAKRISHNAN.

S. Krishna Reddiar and others .. *Petitioners**

v.

The State of Madras represented by the Special Tahsildar, Land Acquisition (Harijan Welfare), Villupuram .. *Respondent.*

Land Acquisition Act (I of 1894), section 4 (1)—Notification under—Enquiry under section 5-A dispensed with—Acquisition for providing housing sites to houseless Harijans—Urgency clause—Resort to—If justified

Constitution of India (1950), Articles 19 and 31—Notification under section 4 (1) of the Land Acquisition Act—Compliance with—Individual notice to the owners—Constructive notice.

A notification under section 4 (1) relating to the acquisition of the lands in question, under the provisions of the Land Acquisition Act, was published in the Gazette Since the matter was one of urgency, it was also indicated in the notification that the enquiry under section 5-A of the Act would be dispensed with. The urgency arose because the existing Harijan colony consisted of 47 families, out of them 16 families were houseless and 21 families lived in low lying fields subject to inundation during rainy season and consequently it was necessary to acquire the lands by resort to the urgency clause for the provision of house sites to 37 Harijan families

Held that, this cannot be considered to be a case where the Government, for the purpose of reaching its subjective satisfaction about the existence of urgency, proceeded on no ground at all or on grounds which could be demonstrably established to be irrelevant. Therefore, resort to urgency clause was certainly not unjustified

*W P. No. 2077 of 1964. 18th August, 1967.

Section 4 (1) itself provides only for public notice of the substance of the notification to be given at convenient places in the locality That requirement has been fulfilled by the beat of tom tom and by affixture in the Mariamman, Temple. But, it is not even necessary that individual notice should be given under section 4 (1) to the owners of the land Board's Standing Order 92, paragraphs 7 and 9 also do not require such individual notice to the owners of the land

Section 4 (1) must be considered as affording the affected persons constructive notice by the publication of the notification both in the Gazette and in convenient places in the locality. In cases of urgency such notice must be deemed as sufficient for the purpose of ensuring to the affected individual an opportunity of knowing about the factum of acquisition and of making such representations as he feels it necessary. Therefore, there is no violation of Articles 19 and 31 of the Constitution.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue a writ of *mandamus* directing the respondent herein to forbear from proceeding with the Land Acquisition proceedings of the lands belonging to the petitioners and situate in Survey No 561-5 and measuring 80 cents in the village of V Pudhur, Gangaranpalayan Post, Villupuram Taluk, South Arcot District, pursuant to the notice of the respondent dated 27th November, 1964

R. S Venkatachalam, for Petitioners

J. Kandakaraj for the Government Pleader, for Respondent

The Court made the following

ORDER —This writ petition is filed by the petitioners who are the owners of lands in R S No 561/5 in Poosaripalayam, hamlet of V. Pudhur village in Villupuram Taluk. The State of Madras represented by the Special Tahsildar, Land Acquisition (Harijan Welfare), is the respondent. A notification under section 4 (1), relating to the acquisition of the above lands under the provisions of the Land Acquisition Act, was published on 2nd September, 1964, in the *Fort St. George Gazette*. Since the matter was one of urgency, it was also indicated in the notification that the enquiry under section 5-A of the Act would be dispensed with It was made clear in the counter affidavit supplied by the Government in this Writ Petition that the urgency in the present case arose because the existing Harijan colony consists of 47 families, that out of them 16 families were houseless, that there are 21 families who lived in low lying fields subject to inundation during rainy season, and consequently it was necessary to acquire the above land by resort to the urgency clause for the provision of house sites to 37 harijan families. This is what is now stated in the counter affidavit of the Government. Thereafter a declaration under section 6 of the Act was published on 11th November, 1964. The counter affidavit of the respondent also stated that public notice of the section 4 (1) notification as required in that section was also given by beat of tom tom and by affixture in the Mariamman Temple The petitioners have filed this writ petition under Article 226 of the Constitution seeking for the issue of a writ of *mandamus* restraining the respondent from proceeding further with the acquisition.

The principal grounds urged by the learned Counsel for the petitioners in support of the relief are the following· It is urged in the first place that the resort to the urgency clause was not justified at all in the circumstances of the present case. This objection is pointless because of the specific averment in the counter affidavit of the respondent to which I have already made reference. That clearly indicates that the existing facilities for residence of the Harijans in the village are totally inadequate and that 16 families are left without houses, and 21 families have facilities to live only in a land inundated with water during rains This cannot be considered to be a case where the Government, for the purpose of reaching its subjective satisfaction about the existence of urgency, proceeded on no ground at

all or on grounds which could be demonstrably established to be irrelevant In a recent decision reported in *Raja Anand Brahma Sah* v *The State of Uttar Pradesh*[1], the Supreme Court dealt with a case where the circumstances clearly indicated that the State Government never applied its mind at all to the matter of urgency. In that case, the land in question under acquisition was actually neither waste or arable land In such circumstances, it was found that the State Government could not in any view of the matter apply the urgency clause under section 17 (4) which requires as a pre-requisite that the land should be arable or waste But here the facts are entirely different The circumstances referred to in the counter affidavit are sufficient from which the Government could form an opinion about the urgency.

The second argument was that individual notice was not given to the petitionert under section 4 (1) of the Act. Reference was made to the Board's Standing Orders 92, paragraph 7 as well as paragraph 9. Paragraph 7 starts with the remark that the publication of a notification under section 4 (1) of the Act is not only a preliminary to entry on the land, but also a necessity in every case as it is a legal notice to persons interested that they may prefer objections to the proposed acquisition The statement thus found in the Board's Standing Order is not authority for deducing that individual notice to the persons interested in the land proposed to be acquired is necessary. Section 4 (1) itself provides only for public notice of the substance of the notification to be given at convenient places in the locality and, that, according to the counter affidavit, had been done in the present case Two unreported decisions of this Court referred to by the learned Government Pleader before me, one in *Venkatachala Thanjirayar v The Special Tahsildar Harijan Welfare, Thanjavur and another*[2] by Srinivasan, J. and the other in *Meclak Nutriments and Pharmaceuticals Ltd., Madras-1 v State of Madras by the Secretary to Govt Home Department, Madras, and another*[3] by Kailasam, J , have laid it down that it is not necessary that individual notice should be given under section 4 (1) to the owners of the land

Learned Counsel has next referred to the provision in Board's Standing Order 90, paragraph 9 read with the rules found in Appendix I of the Board's Standing Order framed by the State Government under section 55 of the Act, and he relied upon these provisions for reinforcing the argument about individual notice. This argument appears to me to be also beside the point because both Board's Standing Order 90, paragraph 9 as well as the rules in Appendix I clearly refer to the notice for the enquiry under section 5-A, and they cannot have application to a case where such enquiry had been dispensed with by reason of the urgency clause.

Learned Counsel urged as a final argument that section 4 (1) of the Land Acquisition Act, in so far as it does not lay down the obligation to give individual notice, to the persons interested in the land under acquisition must be considered as violative of the constitutional provisions in Article 19 giving all citizens the freedom to acquire, hold and dispose of property, and in Article 31, which gives all citizens the safeguard that their properties shall not be taken away from them save by the authority of law. A reference to Article 31 (2) of the Constitution shows that the freedoms enunciated in Article 19, and Article 31 (1), must be considered along with the provision in section 31 (2) which deals with compulsory acquisition of property for public purposes. Such acquisition can be made for a public purpose provided there is the authority of a law which contains provisions for the payment of compensation for the properties acquired Therefore, an enactment like the Land Acquisition Act cannot be struck down as unconstitutional, if it ensures the payment of compensation, as enunciated in Article 31 (2) of the Constitution However, learned Counsel states that the right of the person who owns property to get prior

1. (1967) 2 S C J 830 A I R. 1967 S.C 1081
2. W P. No 219 of 1963.
3. W P No. 1846 of 1965.

notice of the intention of the Government to take away his property in exercise of the powers of eminent domain, is also a fundamental right and where that right is sought to be taken away, under any law that law must be deemed to be unconstitutional. As against this argument, it has to be pointed out that section 4 (1) provides for the necessary publication in the Gazette and also a publ c notice. The statute appears to have deliberately restricted itself to these methods of publication (in cases where the urgency clause is applied) and has not insisted upon individual notice, because it may very well happen that the service of indiv dual notices may take a prolonged period of t me and thereby defeat the very purpose for which the urgency which had been invoked In such cases the individual affected should be deemed to have received constructive notice of the acquisition both by the publication in the Gazette as well as by the notice published in the locality Further as mentioned already, the prior decisions of this Court have clearly laid it down that section 4 (1) cannot be construed as conferring upon the owner of the land a right to obtain individual notice Section 4 (1) must be considered as affording the affected persons constructive notice by the publication of the notification both in the Gazette and in convenient places in the locality In cases of urgency such notice must be deemed as sufficient for the purpose of ensuring to the affected individual an opportunity of knowing about the factum of acquisition and of making such representations as he feels it necessary I am of the opinion that there are no valid grounds for interfering with the notification in this case and dismiss the writ petition. There will be no order as to costs

V M K ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

PRESENT:—MR. JUSTICE P RAMAKRISHNAN

Ramaswami Goundar . *Petitioner**

v.

The Board of Revenue, Madras by the Commissioner of Civil Supplies, Settlements and Land Reforms and others . *Respondents*

Madras Estates Land Act (I of 1908), *sections* 3 (16) (a) *and* 20—*Scope—Order of Deputy collector in proceedings under section* 20—*Finality*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), *section* 11—*Lands whether tank-bed lands—Determination of —Criteria*

The Rasipuram estate was notified and taken over by the Madras State under the Madras Estates Abolition Act with effect on and from 3rd January, 1951. Pursuant to the above, the estate was surveyed and was found to be tank-bed. The petitioner applied for the grant of a ryotwari patta to him in respect of the said lands under section 11 of the Abolition Act It was rejected by the settlement authorities as well as by the Board of Revenue Hence the present writ petition.

The petitioner urged that by an order passed in 1948 by the Deputy Collector in an application under section 20 (1) of the Estates Land Act, the abovesaid lands had been held to be not tank-bed and since no suit was filed to challenge this order within the time allowed, the finding had become conclusive and that therefore he was entitled to a ryotwari patta under section 11 of the Abolition Act. He further urged that the Board of Revenue as well as the settlement authorities when called upon to exercise their powers under section 11 of the Abolition Act had failed to take into account the relevant data and if they had not done so, they would have determined that the lands in question were not tank-bed lands but ryotwari lands in the occupation of the petitioner on the date of the notification and therefore he should have been granted a ryotwari patta

* W P. No. 244 of 1965 13th September, 1967.

Held, (*i*) the petition under section 20 (1) of the Estates Land Act was not a representative one, on behalf of all the ayacutdars of the tank and the Government was also not a party to that petition Therefore the Government in whom the estate had come to vest, are entitled to contend that the ayacutdars as a body, as well as the Government are not affected by the above decision of the Deputy Collector and it will be still open to the Settlement Officer in an application under section 11 of the Abolition Act to decide whether the land is a tank-bed land or communal land vesting in the Government under section 3 of the Estates Land Act and whether patta can be given to the petitioner, in such circumstances under section 11 of the Abolition Act.

(*ii*) There was sufficient data before the settlement authorities for the conclusion reached that the lands in question were tank-bed lands and that therefore no patta could be granted under section 11 of the Abolition Act.

It is necessary to determine in such cases whether the lands are liable to submersion when the tank is full, whether the depth of the water likely to stand on the land would be very little and whether the period of submersion would be very short.

The present case is not a case of lands near a tank-bed subject to partial submersion, but it is a case of lands which lie in the heart of the tank itself and which when the tank gets full supply are likely to be submerged in water for five months Consequently, the settlement authorities could not grant pattas to such lands because such tank-bed lands vest in the Government under section 3 of the Estates Land Act.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to Board's Reference Ms. No. 116/63 and quash the order of the first respondent passed therein dated 10th December, 1963, in so far as it relates to petitioner's lands S. No. 172/9, Pro. Pt, and quash the order made therein.

V Vedanthachari, for Petitioner

The Assistant Government Pleader, for Respondents

The Court made the following

ORDER —The scope of this writ petition lies within a narrow compass and it will be sufficient to set out the facts briefly to the extent that is necessary for the disposal of the points in controversy The petitioner Ramaswami Gounder relied on two pattas granted by the proprietor of the Rasipuram estate. Patta 726 was granted in respect of 10 acres situated in S No 172/9 of the former inam estate of Rasipuram village by an order of assignment by the proprietor in 1943, a date prior to 1st July, 1945, and Patta No 730 was granted in respect of 4 acres 5 cents situated in the same S No. 172/9, by an order of the proprietor on 4th September, 1945, subsequent to 1st July, 1945 The Rasipuram estate was notified and taken over by the Madras State under the Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948) with effect on and from 3rd January, 1951. Pursuant to the above, the estate, was surveyed and S. No 172/9 was found to be a tank-bed Relying on the strength of the order of the former proprietor granting the aforesaid pattas, the petitioner applied to the Additional Assistant Settlement Officer for grant of ryotwari patta to him in respect of the said lands under section 11 of the Abolition Act. The Additional Assistant Settlement Officer dismissed the application on 3rd March, 1958 The appeal before the Settlement Officer was dismissed on 13th June, 1958, and a further appeal to the Director of Settlements was dismissed on 21st January, 1959 Finally the Board of Revenue in revision also dismissed the petitioner's application by an order dated 10th December, 1963 The petitioner contends that, by an order dated 25th March, 1948, passed by the Deputy Collector, Namakkal in an application under section 20 (1) of the Estates Land Act, the above

said land had been held to be not tank-bed land, falling within section 3 (16) (*d*) of the Estates Land Act and that the petitioner was not liable to be evicted therefrom. Since no suit was filed to challenge this order of the Deputy Collector in the Civil Court, the above finding had become conclusive The petitioner had carried out vast improvements on the said lands spending large sums of money. He had built a tiled shed and a terraced building, he had also dug three wells In the above circumstances, it was contended that the petitioner was entitled to a ryotwari patta to the aforesaid lands under section 11 of the Abolition Act and consequently the Board's order was liable to be quashed. It is urged that the Board of Revenue as well as the Settlement Authorities when called upon to exercise their powers under section 11 of the Abolition Act had failed to take into account the relevant data and that if they had done so, they would have determined that the lands in question were not tank-bed lands but ryotwari lands in the occupation of the petitioner on the date of the notification and therefore he should have been granted a ryotwari patta. The prayer in this petition is therefore to quash the order of the Board of Revenue by a writ of *certiorari* under Article 226 of the Constitution and for consequential reliefs

In the counter affidavit filed by the respondent, the Board of Revenue, it is urged that the Board of Revenue as well as the Settlement Authorities had taken into account all the relevant data for their conclusion, as well as the relevant tests which the decisions of Court have laid down for dealing with a similar matter It is also urged that no finality is attached to the order of the Deputy Collector in the proceedings under section 20 (1) of the Estates Land Act referred to by the petitioner both by reason of the actual finding of the Deputy Collector and by reason of the fact that the Government was not a party to that proceeding The Board also averred that the petitioner had applied to the Board of Revenue as an alternative prayer that in view of the fact that he had put up substantial structures on the land, his position might be examined under the provisions of section 19-A of the Abolition Act and appropriate directions passed thereunder to ensure his continuance in possession.

The Board of Revenue had borne this provision in mind and had directed a preliminary enquiry to be made for that purpose.

The first point for consideration is the effect of the order of the Deputy Collector in section 20 proceedings under the Estates Land Act passed in 1948 in M.P No. 2 of 1945. Section 20 reads thus:

> " (1) The Collector may, on the application of the landholder or other person interested decide any question as to whether any land is or is not of the description mentioned in sub-clause (*a*), (*b*) or (*c*) of clause (16) of section 3, or as to the customary rights in the user of any land which is of any such description, as existing at the commencement of this Act
>
> (2) Any person aggrieved by such decision may within a period of one year from the date thereof institute a suit in the civil Court to establish the right claimed by him in respect of such land but subject to the result of such suit, if any, the Collector's decisions shall be final "

I have perused the order of the Deputy Collector dated 25th March, 1948. That application was filed by some persons who claimed to be the ayacutdars under the Rasipuram Eri for a declaration that the land in question was of the description mentioned in section 3 (16) (*a*) of the Estates Land Act forming the tank-bed of Rasipuram Eri and as a consequence of such a declaration, the respondents, namely Varadappa Goundan and others (including the petitioner who was the 11th respondent there) might be evicted from the lands in their occupation Issue 1 reads thus: " Whether the respondents are in enjoyment of portions of tank-bed of Rasipuram tank under patta issued by the Respondent—Mittadar?" The Deputy Collector found under this issue that there was no documentary evidence to show that the portions in the occupation of the respondents formed part of the Rasipuram tank-bed and that issue was therefore found against the petitioners. While giving

the reasons which led up to this finding, the Deputy Collector observed that there was no evidence to show the actual extent of the tank-bed land of the Rasipuram Eri and that in the absence of the information it was not possible to locate the tank-bed land of the said Eri Issue 2 reads thus "Whether the mittadars have any right to issue patta to respondent-ryots over tank-bed lands for cultivation?" The Deputy Collector answered this issue by saying that "the mittadars have right to issue pattas even for tank-bed lands for cultivation, subject to the condition that the customary right of storage is not affected". This issue was decided in favour of the respondents subject to the above condition Issue 6 was to the following effect :- "Whether the grant of pattas to respondents Nos 7 to 13 does not affect the rights of the petitioners as ayacutdars?". The Deputy Collector answered this issue by finding that "the bed of the tank in an Estate belongs to the landholder and he has the proprietory right over it and hence he has got right over it and hence he has got right to issue pattas for cultivation when the water recedes and so long as the cultivation does not prevent the storage of water when the rain comes; the petitioners have not let in evidence to show that the right as ayacutdars has been affected by this grant of the patta." Hence this issue was also found against the petitioners. It appears to me that the above findings given by the Deputy Collector were really in the nature of alternative findings So far as the question about declaration of the lands in question as tank-bed lands, which was one of the prayers of the petitioners there, was concerned, the Deputy Collector declined to grant that prayer, because according to him there was no sufficient evidence to enable the actual limits of the tank-bed to the localised The alternative finding was that even if the lands in question were found to fall within the description of tank-bed, under the provisions of the Estates Land Act, the tank-bed vested in the mittadar, and he had a right to issue pattas even in regard to such tank-bed lands for cultivation when the water receded subject to the condition that the right of storage was not affected and the ayacutdars under the tank were not prejudiced Learned Counsel for the petitioner has referred to the order of the Board of Revenue in this case and in particular portions of the Order of the Board of Revenue where the Commissioner has stated that the decision of the Deputy Collector affirmed that the lands in question constituted part of Rasipuram tank-bed Mr. V. Vedantachari, learned Counsel for the petitioner urges that the Deputy Collector did not give any such finding. On the other hand, the stand taken by the learned Counsel is that the Deputy Collector's finding amounts to a declaration that the lands in question are not tank-bed lands, and that in the abence of a suit to set aside that finding within one year, the time limit prescribed under section 20 (2) of the Estates Land Act, this will amount to a conclusive determination that the petitioners' lands are not tank-bed lands and that therefore no impediment should be placed in the way of the petitioner getting a patta under section 11 of the Abolition Act. While it may be that the Board's observation that the Deputy Collector found that the lands in question constituted part of Rasipuram tank-bed, actually goes beyond the findings of the Deputy Collector under issues, 1, 2 and 6 extracted above, equally it may be held that the Deputy Collector has not given a conclusive and final decision that the land is not a tank-bed land, because of the further observations in his judgment that if the lands were tank-bed lands, it was open to the mittadar to grant portions of it on patta provided the irrigation rights of the ayacutdars under the tank were not affected It appears to me that what the Deputy Collector decided was that there was not sufficient evidence before him to show the extent of the tank-bed land or data to show that the lands in question formed part of the Rasipuram tank-bed Nevertheless the petitioners before him, could not be granted the relief of eviction which they sought, because even if the lands were tank-bed lands, the mittadar had the right to grant patta in respect of tank-bed lands in certain contingencies and it was not established before him that the grant of patta in that case had prejudiced the irrigation rights of the ayacutdars.

Apart from this, one other circumstance to be noticed is that the petition under section 20 (1) of the Estates Land Act filed before the Deputy Collector was not a

representative one, that is, on behalf of all the ayacutdars of the tank, and the Government was also not a party to that petition. Therefore, the Government in whom the estate has come to vest, and who have an obligation to ensure to all the ayacutdars of the tank the customary supply of water to their lands from the tank are entitled to contend that the ayacutdars as a body, as well as Government, are not affected by the above decision, and it will be still open to the Settlement Officer in an application under section 11 of the Abolition Act, to decide whether the land is a tank-bed land or communal land vesting in the Government under section 3 of the Estates Land Act, and whether patta can be given to the petitioner in such circumstances under section 11.

The next point for consideration is whether there were sufficient data before the Settlement Authorities for the conclusion which they reached that the lands in question were tank-bed lands, and that therefore no patta could be granted to the petitioner under section 11 of the Abolition Act Mr. Vedanthachari learned Counsel for the petitioner urges streneously that while discussing the evidence, the Settlement Authorities have not kept in view the relevant principles laid down in *State of Madras* v. *Estates Abolition Tribunal*[1]. Before the application of the principles laid down in that decision can be considered, it is important to find out what are the facts that are made out in the case, and on which the Settlement Authorities rely On behalf of the petitioner there was evidence of grant of patta to him by the mittadar in 1943 for some of the lands and in September, 1945 for other lands, the former grant falling before and the latter after the crucial date 1st July, 1945, mentioned in the Proviso to section 11 of the Estates Abolition Act The petitioners pleaded that they had put up substantial structures on the land and dug wells at a considerable cost and that for more than 25 years, they had been cultivating the lands and raising wet and dry crops On the other hand, on behalf of the Government main reliance was placed upon the real situation of the land in question with reference to the tank-bed The Minor Irrigation Overseer prepared a sketch and took levels including F T L (Full Tank Level) and M W L (Maximum Water Level) of the tank The sketch was filed as Exhibit B-2 The Minor Irrigation Overseer deposed that the entire plot shown as S No 172/9 was liable to submersion for more than five months in a year if the tank got full supply The Settlement Officer has considered this situation in greater detail and the following portions of the order can be extracted:

> " A look at Exhibit B-2 the sketch prepared by the Minor Irrigation Overseer will show that the lands under revision are the nearest lands to the bund of the tank. Therefore if there is a tank at all in S No. 172 these lands will be liable to submersion first and foremost The Minor Irrigation Overseer has stated in his evidence that with reference to the capacity of the three sluices in the tank the tank will contain water for 6 months at Full Tank Level The Minor Irrigation Overseer has also stated that all the lands bounded by blue line in the sketch Exhibit B-2 will be liable to submersion for over 21 days Considering the fact that the lands under revision are very close to the bund of the tank and situated in the heart of the tank, I have no hesitation in accepting the evidence of the Minor Irrigation Overseer that all these lands will be liable to submersion for well over 21 days in an year In fact as stated by the Minor Irrigation Overseer the submersion of these lands will be a matter of months and not of days The submersion in the course of a normal year has to be considered with reference to the Full Tank Level of the tank and that the fact that due to drought condition for the last several years the tank has not received full supply is not relevant to this consideration Therefore considering the situation of the lands in the heart of the tank-bed close to the bund of the tank and on the evidence of the Minor Irrigation Overseer and considering the size and capacity of the tank, I have no hesitation in agreeing with the Assistant Settlement Officer that all

1. (1958) 2 M L J. 585.

the lands under revision are liable to submersion for well over 21 days in a normal year and are therefore part of the bed of the tank only."

A certain amount of attack was made against the evidence of the Minor Irrigation Overseer, laying stress on the infirmities in his evidence The Director of Settlements in commenting on this aspect of the Minor Irrigation Overseer's evidence, has remarked that "It would indeed have been satisfying if the Minor Irrigation Overseer has not only set forth his conclusions but also the data on which those conclusions are based in full in his report of inspection". But the Director of Settlements also stated that want of such data would not in itself militate against the credibility of the Minor Irrigation Overseer's evidence or the tenability of his conclusion when his interestedness had not been proved or rather his disinterestedness was not challenged and when his conclusions were borne out by the observations made by the Settlement Officer

The sketch which was prepared by the Minor Irrigation Overseer and which was shown to me at the time of the hearing of the writ petition shows that these lands are not strictly foreshore lands in the sense of their being near the upper reaches of the tank bed proper but they are situated in the heart of the tank itself, very close to the bund, and very near to the sluices It is this situation of the lands in the heart of the tank and close to the bund of the tank, which has weighed considerably with the Settlement Authorities for holding that these are not really lands which are liable to occasional submersion, but must be considered to be lands situated in the tank-bed proper

In the light of these facts in the case, it is necessary to apply the principles which the decision of this Court has laid down, in *State of Madras* v. *Estates Abolition Tribunal*[1], The learned Judges have observed that in respect of lands near a tank-bed that are liable to submersion when the tank is at full level the initial presumption, which is however rebuttable, is that the lands form part of the tank-bed, that in many cases it may not be so, that even lands that are liable to submersion could be privately owned as patta lands in ryotwari areas and that the position in this respect in Zamindari village can in no way be different. Stress has to be laid on the words " near a tank-bed," on the above observation. Therefore the Bench observed:

> " Factors like registration of such lands as ryoti lands and dealing with the lands as such for a long number of years or cultivating the lands continuously for a long period will all be valuable pieces of evidence to decide whether patta could be issued in respect of such lands. But fugitive cultivation of pieces of land in tank-beds during dry season cannot be treated as evidence that the land is patta land."

Later on, in the judgment, the learned Judges observed:

> " The initial presumption that lands liable to submersion are tank-bed lands would lose much of its strength whenever it appears that the despatch of the water likely to stand on the land would be very little, or that the period of submersion would be very short. . . . .
>
> General statements of villagers or of the karnam or even reports made by higher officers based on a single visit to the village made for the purpose will not have the same usefulness as accurate figures obtained after taking levels. In such cases it would be very desirable to have a plan prepared showing the levels and the other necessary details The period during which water is likely to stand on the lands must no doubt to a large extent be the subject-matter of oral testimony, but a measure of check on the truthfulness or accuracy of those statements can be effected by taking into account the area of the tank, the area of the ayacut under it, the source or sources from which the tank derives its supplies, the contour of the villages and other facts an officer of the Land Revenue Department, the Minor Irrigation Department or the Public Works Department is expected

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1. (1958) 2 M L J. 585.

to be familiar with. As we said, a map showing all these details should be of considerable help "

It is necessary to determine in such cases whether the lands are liable to submersion when the tank is full, whether the depth of the water likley to stand on the land would be very little and whether the period of submersion would be very short. It appears that the criterion of a minimum of 21 days' submersion has been adopted by the Settlement Authorities as a principle for their guidance based on practical experience Even assuming for the sake of argument that this limit of 21 day's submersion has no statutory basis behind it, the present case is not a case of lands near a tank bed subject to partial submersion but it is a case of lands which lie in the heart of the tank itself and which when the tank gets full supply are likely to be submerged in water for five months, as found by the Assistant Settlement Officer. In my opinion there were sufficient data before the Settlement Authorities for coming to that conclusion, when it is found that the lands which even though they may have been cultivated for a number of years and for which the Zamindar might have granted pattas, are so situated that they are in the heart of the tank itself and liable to submersion for long periods when the tank is full, there will be no doubt about their being in the nature of tank-bed lands Consequently the Settlement Authorities could not grant pattas to such lands because such tank-beds lands vest in the Government under section 3 of the Estates Land Act Learned Counsel for the petitioner has drawn my attention to a portion of the order of the Board of Revenue which has reference to the claim for relief under section 19-A of the Abolition Act, and wherein the Board ordered the Director of Settlements to consider the claim of the petitioner and to pass appropriate orders after necessary enquiry It appears to me that if it is made out in that enquiry that the petitioner has spent substantial sums of money by digging up wells and putting up structures, it will be just and proper that he is given appropriate relief under section 19-A Any relief that may be so given will be subject to the preservation of the tank as such and the ensuring of proper irrigation facilities to the ayacutdars

The petition is therefore dismissed. No order as to costs.

V K. —— *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K VEERASWAMI AND MR JUSTICE T. RAMAPRASADA RAO.

M/s. Premier Electro-Mechanical Fabricators, Madras-2 .. *Appellants**

v.

The State of Madras represented by the Joint Commercial Tax Officer, Mount Road .. *Respondent.*

Madras General Sales Tax Act (I of 1959), section 3 (3)—Applicability of— To concessional rate, when dealer entitled—Production of declaration in the prescribed form as per Proviso to section 3 (3)—Sufficiency of—Whether bound to show that declaration has been given effect to, to get concession.

What section 3 (3) enacts is that, notwithstanding what is contained in sub-section (2), a dealer is entitled to the concessional rate as a matter of right, provided he satisfies the requisites of that sub-section. The requisites are three-fold: (1) the goods, which are the subject-matter of sale, should be those mentioned in the first schedule, (2) the sale must be to another dealer, and (3) the goods sold should be for the use by the purchaser as component part of any other goods mentioned in the first schedule, which he intends to manufacture inside the State for sale If these requisites are satisfied, the lower rates of tax under sub-section (3) will apply The assessee satisfies the third requisite, if he complies with the proviso, and he is not called upon, beyond production of a declaration

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* T.C No 162 of 1966 (Appeal No. 4). 17th October, 1967.

in Form XVII, to show that the declaration has been given effect to It is true that, in order to satisfy the third requisite, the goods sold should be for use by a purchasing dealer as component part of some other goods to be manufactured. But the manner in which the seller has to satisfy the requisite is as provided in the Proviso to the sub-section, namely production of the declaration in the prescribed form. Once that is done, there is no further obligation on the part of the selling dealer and he will automatically be entitled to the concessional rate. If the declaration turns out to be false, in the sense that the goods purchased have not been used as declared in the prescribed form, the purchaser is exposed to the penalties provided by section 23 and section 45 (2) (*e*). (*Held* on facts that the petitioner is entitled to the concessional rate).

Appeal under section 37 of Sales Tax Act (Rule 30) praying the High Court to revise the Order of the Board of Revenue, Madras, dated 15th April, 1966 and made in B P Rt No 1167 of 1966 against the order of the Appellate Assistant Commissioner (CT) III Madras, dated 17th August, 1962 in Appeal No. 48 of 1962-63 against order of the Joint Commercial Tax Officer, Mount Road, dated 25th January, 1962 in MGST No. 1100/1960-61.

C S Chandrasekhara Sastri, for Petitioner

The Special Government Pleader, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, J—The turnover in dispute in this tax case filed by the assessee in a sum of Rs. 10,120-75 relates to sales of frames, nuts, tubes, rollers, wheels, etc The assessee claimed the benefit of section 3 (3), which provides for a concessional rate of one per cent He produced a declaration in Form XVII, which has been prescribed in terms of the proviso to sub-section (3) of section 3 There is no dispute as to the factum or truth of the certificate of this declaration The assessing authority disallowed the claim, on the ground that the sale-bills did not show the name and details of the machinery Nevertheless, he assessed the good at three per cent. treating them as falling within entry 23 of the First Schedule of the Madras General Sales Tax Act, 1959 He also considered that there was no proof that the component parts were used in the same form without any further processing. The Appellate Assistant Commissioner, however, took a different view and held that the turnover was eligible for the concessional rate In exercise of its *suo motu* powers of revision, the Board of Revenue upset that order and restored that of the first authority The reasoning of the Board of Revenue, we are bound to say, is far from satisfactory. It appears to have wholly misapprehended the scope of sub-section (3) and the Proviso thereto It propounded the question for its consideration as whether the goods sold by the dealer as such had been used as component parts as contemplated in section 3 (3). It went further and, on investigation, found that the goods supplied by the assessee underwent physical changes such as drilling of holes, sizing of thickness, etc This approach, again, exhibits a misdirection on the part of the Board.

What section 4 (3) enacts is that, notwithstanding what is contained in sub-section (2), a dealer is entitled to the concessional rate as a matter of right, provided he satisfies the requisites of that sub-section The requisites are three-fold: (1) the goods, which are the subject-matter of sale, should be those mentioned in the First Schedule, (2) the sale must be to another dealer, and (3) the goods sold should be for the use by he purchaser as component parts of any other goods mentioned in the First Schedule, which he intends to manufacture inside the State for sale. If these requisites are satisfied, the lower rate of tax under sub-section (3) will apply. So far as the first requisite is concerned, the assessing officer himself has treated the goods sold as falling within the First Schedule. It was only on that basis he charged three per cent. There is no dispute about the second requisite being satisfied for, the purchaser is undoubtedly a dealer The mis-apprehension of the Department was particularly in respect of the third requisite. The assessee satisfied the

requisite, if he complies with the proviso, and he is not called upon, beyond production of a declaration in Form XVII, to show that the declaration has been given effect to. It is true that, in order to satisfy the third requisite, the goods sold should be for use by a purchasing dealer as component parts of some other goods to be manufactured. But the manner in which the seller has to satisfy the requisite is as provided in the Proviso to the sub-section; namely, production of the declaration in the prescribed form Once that is done, there is no further obligation on the part of the selling dealer and he will automatically be entitled to the concessional rate. If the declaration turns out to be false, in the sense that the goods purchased have not been used as declared in the prescribed form the purchaser is exposed to the penalties provided by section 23 and section 45 (2) (*e*) If the purchaser makes a false declaration or a declaration which he does not comply with he would do so under peril of meeting those penalties. But on that account, the selling dealer is not deprived of the concessional rate. The physical changes which the Board mentioned do not appear to us to bring about any substantial change to the fact that the goods sold will fall within the First Schedule and are to be used as component parts by the purchasing dealer in the manufacture of some other goods falling within that Schedule

The Tax Case is allowed with costs Counsel's fee Rs 100.

S.V.J. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR JUSTICE T. VENKATADRI.

The Management of Messrs. Andhra Laundry (Proprietor R. A. Masillamani) .. *Petitioner**

v.

The Presiding Officer, Additional Labour Court, Madras and others .. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 25-FFF—Closure compensation—Workmen receiving, in full settlement of their claims, lesser amount than what they were entitled to—If estopped from claiming full statutory benefits.

There seems to be a difference in the wording of the sections in the Industrial Disputes Act between retrenchment compensation and closure compensation. In the case of retrenchment, the parties cannot waive payment of compensation or notice, but it appears that the parties can, in the case of closure compensation, contract themselves out of the statute.

Consequently, where on the closure of an undertaking the workmen thereof were paid a certain amount as closure compensation and the workmen received the amount and passed recipts in full and final settlement of their claims, with full knowledge of their rights, they cannot later on contend that what was received by them was much less than what the statute provided for and that therefore they should be paid the full statutory benefits conferred on them by the Act The passing of receipts by the erstwhile employees in full and final settlement of their claims would amount in law to an act of waiver or estoppel.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed with W P No 62 of 1965 on the file of the High Court, the High Court will be pleased to issue a writ of *certiorari* calling for the records in C P Nos 459, 460, 462, 464, 466, 468, 461, 465, 469, 470 and 467 of 1963 respectively, on the file of the Additional Labour Court, Madras, and quash the order dated 28th October, 1964 and made in C P Nos. 459, 460, 462 463, 464, 466, 467 and 468 of 1963 and the order dated 27th October, 1964 in C P. Nos 461, 465, 469 and 470 of 1963

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*W. P. Nos. 62 to 73 of 1965. 30th November, 1967.

M.R Narayanaswamy and *D. Meenakshisundaram*, for Petitioner.

B. Lakshminarayana Reddy, for 2nd Respondents.

The Court made the following

ORDER:—An important and interesting question of law arises in these writ petitions namely whether the receipts passed by the erstwhile workmen to the management in full settlement of all their claims at the time of the closure of the business would estop them from claiming the full statutory benefits conferred on them under the Industrial Disputes Act

The petitioner in all these writ petitions is the management of Messrs. Andhra Laundry. There was an industrial dispute between the management of the Laundry and its workmen, and the Labour Court, Madras passed an award, by consent of parties, in I.D No 32 of 1962 relating to demands for revision of pay-scales, payment of dearness allowance and for the introduction of a gratuity scheme. The management carried out the obligations undertaken by it in that award However, in July, 1963, the management did not find it possible to continue the business and decided to close the Laundry That was mainly because the proprietor of the Laundry was incapacitated to manage the business due to loss of vision of his eyes. Accordingly, the management issued a notice of closure dated 27th June, 1963 informing the workmen that it had decided to close down the business in accordance with section 25-FFF of the Industrial Disputes Act with effect from 1st August, 1963 and that the workers would be paid all their dues in accordance with law on and from 30th July, 1963 during working hours. All the workmen received their wages, retrenchment compensation and gratuity from the management. All the workmen passed individual receipts for having received the sums mentioned therein from the management of Andhra Laundry towards retrenchment compensation, gratuity and arrears of wages in full quit of all claims including reinstatement in view of the closing down of the Laundry from 31st July, 1963.

The very next day, the Tamilnadu Employees' Union sent a communication to the management informing it that the workmen had received their amounts under protest, that until they were paid their wages according to law they would offer satyagraha and picketing in front of the shop of the Laundry. There is no evidence that the Union carried out the threat as mentioned in its communication. But the erstwhile workmen filed claim petitions before the Labour Court, Madras, under section 33-C (2) of the Industrial Disputes Act, claiming computation of the benefits of retrenchment compensation, gratuity and leave wages under the Act after giving credit to the amount received from the management just on the eve of closure of the business.

These petitions were resisted by the management that the workmen were paid closure compensation, gratuity and arrears of wages, that each of the workmen had passed a stamped receipt in full and final settlement of all his claims, that even before the closure of the business a notice of closure was sent to them together with the details of rates of wages, compensation and gratuity due to them and that, having received the amounts in full settlement of their claims, they could not file any petition to claim the alleged balance of amount due to them and that it was no longer open to them to go behind the same and make further claims on the management.

The Labour Court found that the workmen received the amounts under protest and passed an order for the amounts due to them after giving credit to the amounts paid by the management before the closure of the business.

The management has filed the present writ petitions questioning the legality of the order passed by the Labour Court The main contention of the management is that the whole matter was summarily disposed of by the Presiding Officer, Additional Labour Court, that it has not dealt with the legal significance of the receipt passed by each of the workmen in full settlement of his claim and that therefore the order passed by the Labour Court suffers from an apparent error,

The point for consideration, therefore, is whether the workmen are entitled to claim the statutory benefits under the Industrial Disputes Act, when they have once received amounts and passed receipts in full and final settlement of their claims with full knowledge of rights

The respondents-workmen admit that they have passed receipts in full settlement of their claims. But now they contend that they received the amounts under protest It is common case that the management nearly a month before the closure of the business, issued notice of closure to each of the workmen together with a statement of wages, compensation and gratuity he would be entitled to The workmen did not protest to the management about the correctness of the amount shown in the statement. Nor did the Union give any notice to the management questioning the propriety and legality of the amounts arrived at in the statement The Union gave notice to the management only after the erstwhile workmen received the amounts due to them and passed the receipts aforesaid A copy of the notice of closure was also sent to the Union If really the Union was interested in its members, it could have protested about the correctness of the figures mentioned in the statements sent to the workmen together with a copy of the notice Having allowed the members to receive the payments and pass the receipts in full settlement of their claims, it does not appear to be fair on the part of the Union to question the propriety of the payment of closure compensation by the management. In their petitions filed under section 33-C (2) of the Act, the workmen did not allege any coercion, or undue influence or practice of fraud on them by the management. Further, the workmen did not plead in their petitions that they received the amounts from the management under protest. It is also common knowledge that the amounts were disbursed in the presence of a third party, R W 1, the proprietor of Vinayakar Medical Hall, situate very near the Andhra Laundry He has stated in his evidence that he attested Exhibit R-1 and the stamped receipts acknowledging the receipt of payment in full settlement of the claims He has stated in his evidence that he was sent for by the Proprietor, that he translated the contents of the receipts as per the request of the workers and that moneys were not received under protest. The Presiding Officer of the Labour Court has not believed the evidence of R W 1 He has stated "disbelieving the evidence of R W 1 and believing the evidence of the petitioner (workmen) I find that the petitioner had not received on 1st August, 1963 the amount from the management in full and final settlement of his claim and that he had received it only under protest " The Presiding Officer of the Labour Court has not assigned any reasons for disbelieving the evidence of R W. 1 In *R.* v. *Agricultural Land Tribunal*[1], the Queens' Bench Divisin has observed :

> " There is a clear distinction between a tribunal that acts without jurisdiction and one which goes wrong in law while acting within its jurisdiction, *e g*, in acting on no evidence or in acting on evidence which ought to have been rejected or in failing to take into consideration evidence which ought to have been considered "

In *State of Orissa* v *Murlidhar*[2], their Lordships of the Supreme Court have held that it is open to the High Court to find out whether there is evidence or not to justify the conclusion Their Lordships of the Supreme Court have held in *Union of India* v. *H.C. Goel*[3], that the High Court cannot consider the question about the sufficiency or adequacy of evidence in support of a particular conclusion, that it is a matter which is within the competence of the authority which deals with the question but the High Court can and must enquire whether there is any evidence at all in support of the conclusion.

Even assuming that the Labour Court has disbelieved the evidence of R.W 1 for valid reasons, still we have to consider the effect in law of passing receipts in

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1. (1960) 2 All E R. 518 at 520.
2. A I.R. 1963 S C. 404.
3. A.I R 1964 S C 364.

full and final settlement of their claims by the workmen. In full and final settlement means termination of a disputed matter by adoption of terms agreeable between the parties the parties may express their consent to receive the agreed amount Even assuming that a person is entitled to a much more amount under the Act, still he can give his approval to take a lesser amount The point for consideration is whether he can question that what he received is not in accordance with the law. Learned Counsel for the management contends that parties can always contract themselves out of the statute or can contract themselves out of the rights given to them by the statute, and that, once they waive the benefits conferred on them, they are estopped by their conduct from setting up a defence Where a statute prescribes that a contract shall be in a particular form, or shall or shall not contain certain terms the statutory form must be followed But in the absence of express prohibition to the contrary, the statutory terms may be waived by the parties to the contract. But the conditions in the statute may be imposed in such terms that waiver is impossible In the instant case under the Industrial Disputes Act, the question for consideration is whether the parties are prevented or prohibited from entering into a contract contrary to the statute In *Melliss* v *Shirley Local Board*[1], Bowen, L J. said :

> " We have to find out upon the construction of the Act whether it was intended by the Legislature to prohibit the doing of a certain act altogether, or whether it was only intended to say that, if the act was done, certain penalties should follow as a consequence. If you can find out that the act is prohibited, then the principle is that no man can recover in an action founded on that which is a breach of the provisions of the statute "

Now the relevant provision in the Industrial Disputes Act is section 25-FFF and it provides that where an undertaking is closed down for any reason whatsoever every workman who has been in continuous service for not less than one year in that undertaking immediately before such closure shall be entitled to notice and compensation in accordance with the provisions of section 25-F, as if the workman had been retrenched While construing that section, their Lordships of the Supreme Court in *Hathising Manufacturing Company* v *Union of India*[2], have observed that it is not a condition precedent to pay closure compensation or give notice before the closure of the business, though no doubt, if the procedure is not followed, certainly an industrial dispute can be raised to claim closure compensation under section 25-FFF and that on the other hand payment of retrenchment compensation and serving of notice or payment of wages in lieu of notice are conditions precedent to retrenchment of workmen under section 25-F In *B N Elias & Co* v *Fifth Industrial Tribunal*[3], certain workmen were retrenched They were not paid retrenchment compensation immediately but it was paid after one month of the retrenchment The concerned workmen received the compensation in final settlement In view of the fact that the retrenchment was effected without complying with the statutory provisions contained in section 25-F of the Act, the Tribunal directed payment of one month wages by way of compensation When it was urged that the concerned workmen were estopped from demanding any further payment since they were paid in final settlement, it was held by the Calcutta High Court that the concerned workmen were not estopped from receiving such payments even though they had received the amounts in full settlement and that there could not be any estoppel against a statute.

There seems to be a difference in the wording of the sections between retrenchment compenation and closure compensation In the case of retrenchment, the parties cannot waive payment of compensation or notice, but it appears that the parties can, in the case of closure compensation, contract themselves out of the statute This can be seen by looking into the provisions of some analogous statutes;

1. (1885) L.R 16 Q B D. 446 at 454.
2. A.I.R. 1960 S.C. 923.
3. (1965) 2 L L.J. 324.

where specific provision has been made that the parties cannot contract themselves out of the statute For instance, the Minimum Wages Act, section 25 provides that any contract or agreement relinquishing or reducing the employee's right to a minimum rate of wages is null and void. Similarly section 23 of the Payment of Wages Act provides that any contract or agreement whereby an employed person relinquishes any right conferred by that Act is null and void in so far as it purports to deprive him of such right. Section 17 of the Workmen's Compensation Act provides that any contract or agreement entered into by a workman with his employer relinquishing any right of compensation from the employer for personal injury arising out of or in the course of employment is null and void in so far as it purports to remove or reduce the liability of any person to pay compensation under the Act. Again, in the Payment of Bonus Act, section 10 says that every employer shall be bound to pay to every employee in an accounting year the minimum bonus whether there are profits in the account year or not. But in the Industrial Disputes Act, as far as closure compensation is concerned there appears to be no provision preventing the parties from contracting out of the statute

The passing of receipts by the erstwhile employees in full and final settlement of their claims amounts in law to an act of waiver, estoppel or election. I do not think that the act of the workmen in this case will amount to election, since election always contemplates the existence of two remedies. But it may amount to waiver or estoppel. It may be waiver, because it is an intentional act with the full knowledge thereof. It is a distinct act done by the workmen The signing of the stamped receipts in full and final settlement of their claims is an intentional act, the intention being to treat the matter as if the condition did not exist or as if the breach of condition had not occurred The workmen signed the stamped receipts with full knowledge of their claims. The conduct of the workmen in refuting their own receipts is an act of approbation and reprobation The conduct of the workmen may also amount to estoppel; for, they were aware of their rights under the Act and they had sufficient time either to reject the terms offered by the management and insist upon the statutory benefits under the Act or accept the terms offered by the management. When once the workmen passed receipts acknowledging the payment in full settlement of their claims, they are estopped from putting forth a claim for the statutory benefits I am clearly of the view that it is a case where the workmen, by receiving the payments and passing the stamped receipts in full and final settlement of all their claims, have deliberately contracted themselves out of the statute. They have thereby waived their right to claim the statutory benefits under the Act They are therefore estopped in law from claiming the benefits under the statute at this stage

For the reasons mentioned in the foregoing paragaphs, the writ petitions are allowed and the order of the Presiding Officer, Additional Labour Court, Madras, is quashed. There will be no order as to costs.

V.K. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. S KAILASAM.

A V Arunachalam, Proprietor, Rohini Touring Talkies, Uthangarai .. *Petitioner**

v.

V. Thandayuthapani and others .. *Respondents*

Madras Cinematograph Rules, rules 14 *and* 101—*Interpretation*—'*Road frontage, and main entrance*'—*Meaning of.*

On the question whether the main entrance to the site of the first respondent is situated within the prohibited distance from the main entrance to the petitioner's touring cinema, held that, in cases where the cinema house is located inside a big site, the road frontage on the public thoroughfare will be the place where the site opens into the road and the main entrance of the cinema will be the actual entrance to the cinema house well inside the site

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the third respondent in B P Rt No. 6149/L., dated 23rd November, 1967, confirming the orders of the second respondent in K. Dis. No. 4640/67 G B., dated 1st August, 1967, and quash the same.

V. P. Raman and *N. R. Chandran*, for Petitioner.

S. Ramalingam, for 1st Respondent.

The Court made the following

ORDER.—This petition is filed by the Proprietor of Rohini Touring Talkies, for the issue of a writ of *certiorari* calling for the records of the Board of Revenue in B. P. Rt. No. 6149/L, dated 23rd November, 1967, confirming the orders of the Collector of Dharmapuri in K. Dis. No. 4640/67 G.B dated 1st August, 1967, issuing a no objection certificate to the first respondent to locate the touring cinema

The petitioner is running a tourning cinema and he objects to the grant of the no objection certificate to the first respondent on the ground that it is situated within the prohibited distance. The petitioner's cinema is located in S. No. 19 and the first respondent's in S No. 3. The route for reaching the site of the first respondent from the petitioner's cinema is to proceed north from the petitioner's site, S No 17, and at the western extremity of S. No 17 to cut into S Nos 8, 7 and 6 to reach the eastern end of S No. 5 and to proceed west along the southern extremity of S Nos. 5 and 4, to reach the site in S. No. 3, in which the first respondent's cinema is sought to be located. It is common ground that the distance upto the entrance to the site of the petitioner is within the prohibited distance. But according to the respondents, the distance from the entrance to the site in S. No. 4 to the actual main entrance of the cinema, which is located very much in the inside of the site, should be taken into account. If the distance covered within S No. 3 is taken into account, the site for cinema is not within the prohibited distance.

The decision on this point would depend upon the construction of rules 14 and 101 of the Madras Cinematograph Rules. Rule 14 provides that the distance between the touring cinema in any place or in adjacent places shall be reckoned along the shortest pathway, lane, street, road, or any other route connecting the cinemas which is generally used by the members of the public and rule 14 (4) provides that the distance between any two cinemas shall be reckoned from the main entrance of one cinema to the main entrance of another. It is the common case that the shortest route between the two cinemas is the one specified earlier. The only ques-

* W.P. No 3967 of 1967. 29th January, 1968.

tion is what is the main entrance to the first respondent's cinema. Rule 101 (1) provides :

"The building shall have a road frontage on the public throughfare upon which the site of such building abuts"; and

Rule 101 (3) provides :

"There shall be suitable means of entrance and exit for the public in such frontage"

The site on which the building is situated has a road forntage on the public throughfare It is also admitted that there is suitable means of entrance and exit for the public in such frontage The road frontage on the public throughfare in the site on which the building abuts will be at the junction in S No 4 where the private road takes off from S No. 4 It was contended by Mr. V P Raman, the learned Counsel for the petitioner that the main entrance of the cinema should be construed as the road frontage on the public thoroughfare I am unable to accept this contention, for the main entrance of the cinema may be very near the building and far removed from the road frontage on the public thoroughfare In cases where the cinema house is located inside a big site, the road frontage on the public thoroughfare will be the place where the site opens into the road The main entrance of the cinema will be the actual entrance to the cinema house well inside the site This view was taken by the Bench of this Court in *T M. Chandrasekharan and another* v. *Mahalakshmi Theatre*[1], where it was held that the expression 'main entrance' in rule 14 (4) has no technical meaning and that as the rule itself shows, 'main entrance' is the entrance of the actual building in which cinema shows are to be given and for the purpose of ascertaining the distance between the permanent cinema and the touring cinema, it would be the measurement has to be made from the permanent cinema to the main entrance of the theatre of the touring cinema Following the decision in *T. M. Chandrasekharan and another* v. *Mahalakshmi Theatre*[1], I accept the view taken by the Board of Revenue and dismiss this petition. There will be no order as to costs

V. M. K. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

The State of Madras represented by the Secretary, Home Department, Madras-9 .. *Petitioner**

v.

S. Krishnan and another .. *Respondents.*

Motor Vehicles Act (IV of 1939), sections 16 and 44 (5) and rule 134-AA framed thereunder—Delegation of the power to suspend the driver's licence to the Superintendent of Police—State Transport Appellate Tribunal questioning the delegation and the rule framed—If permissible under the Act.

The Motor Vehicles Act under section 16 conferred the power of suspension of a driver's licence on the Regional Transport Authority. A power of delegation is conferred on the Regional Transport Authority under section 44 (5) of the Act. Section 44 (5) of the Act contains a qualification that such delegation by the Regional Transport Authority of its powers and functions can be made only if authorised in this behalf by Rules framed under section 68 Rule 134-AA is a rule so framed. It was relied upon by the Superintendent of Police as the rule making such delegation to him of the power of suspension of a driver's licence.

Could the State Transport Appellate Tribunal constituted under the Act question the validity of the rule framed thereunder?

1 W.A No. 153 of 1962.

* W.P. No. 2762 of 1965. 30th January, 1968.

Held that, an authority constituted under an Act cannot, unless expressly so authorised, question the validity of any of the provisions thereof *Venkataraman & Co.* v *State of Madras* (17 S T C 418 : (1966) 2 S.C R. 229: (1966) 1 I T J. 415 . (1966) 1 M.L.J. (S.C) 108 · (1966) 1 An. W R (S C.) 108: (1966) 1 S.C.J. 515) followed. Consequently, the State Transport Appellate Authority, as an authority constituted under the Motor Vehicles Act, in the absence of an authorisation to do so, cannot question the validity of the Act or a rule framed thereunder Therefore, since the order of the State Transport Appellate Tribunal in this case amounts to a declaration that rule 134-AA is an invalid rule, as it suffers from the defect of improper delegation, it was beyond the jurisdiction of the State Transport Appellate Tribunal to give such a decision

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to Appeal No 313 of 1964 on the file of the State Transport Appellate Tribunal, Madras and quash the order made therein dated 11th June, 1964

S. T. Ramalingan, for Government Pleader, for Petitioner

K. Ramachandran and *G. Desappan*, for 1st Respondent.

The Court made the following

ORDER.—The Superintendent of Police, Thanjavur, suspended for a period of ten days the driving licence of one Krishnan, a lorry driver, for the alleged offence of overspeeding For exercising this power, the Superintendent relied upon the delegation mentioned in rule 134-AA of the Rules framed under the Motor Vehicles Act read with section 44 (5) and section 16 of the Motor Vehicles Act The Motor Vehicles Act under section 16 conferred this power on the Regional Transport Authority A power of delegation is conferred on the Regional Transport Authority under section 44 (5) of the Act. Section 44 (5) of the Act contains a qualification that such delegation by the Regional Transport Authority of its powers and functions can be made only if authorised in this behalf by Rules framed under section 68. Rule 134-AA is a rule so framed and it was relied upon by the Superintendent of Police as the rule making such delegation to him of the power of suspension of a driver's licence

The driver aggrieved against this order appealed to the State Transport Appellate Tribunal. The Tribunal was of the view :

> "It will however be seen that rule 134-AA, which authorises the Regional Transport Authorities to delegate their powers and functions under section 16 of the Act, is framed under section 68 of the Act under Chapter IV It seems to me that there cannot be any delegation of powers vested in the Regional Transport Authorities under section 16 of the Act even if rules are framed under Chapter II, for the simple reason that the only enabling provisions of the Act authorising the Regional Transport Authorities to delegate power is sub-section (5) of section 44, which as already indicated, restricts the powers that are capable of delegation to those that appear in Chapter IV"

The State Transport Appellate Tribunal thereupon allowed this appeal.

The State of Madras has filed this writ petition for the issue of a writ of *certiorari* quashing the order of the State Transport Appellate Tribunal, the second respondent in this writ petition, allowing the appeal of the driver, Krishnan, the first respondent, for the reason set out above, namely, the absence of jurisdiction of the Superintendent of Police for disqualifying the driver.

Learned Counsel appearing for the State urged that the interpretation given to the scope of delegation enunciated in section 44 (5) of the Act, by the State Transport Appellate Tribunal is incorrect. It was urged that though section 68 of the Act in terms confers power to make Rules for the purpose of carrying into effect the provisions of Chapter IV, the purport of rule 134-AA is to give effect to

the general power of delegation contained in section 44 (5) which is a section found in this chapter. It is only to find out what power conferred on the Regional Transport Authority which is sought to be so delegated under section 44 (5), that one has to go to section 16 of the Act, which confers the power to disqualify a driver on the Regional Transport Authority In fact, there is a cross reference in section 16 to Chapter IV, when it refers to a Regional Transport Authority constituted under Chapter IV. Therefore, the power to disqualify a driver is a power initially conferred on the Regional Transport Authority constituted under Chapter IV. Thereafter under the scope of the power of delegation contained in section 44 (5), read with rule 134-AA, the Superintendent of Police has exercised the power in this case This is the course of reasoning adopted by the Government Pleader for the State for sustaining the attack against the finding of the second respondent, the State Transport Appellate Tribunal.

While I am generally inclined to accept this argument, it is not necessary to decide this question finally in this writ petition for the simple reason that the decision of the Supreme Court in *Venkataraman & Co.* v *State of Madras*[1] has clearly laid down the principle that an authority constituted under an Act cannot, unless expressly so authorised, question the validity of any of the provisions thereof (*vide* page 438 of the report) Consequently, the State Transport Appellate Authority, as an authority constituted under the Motor Vehicles Act, in the absence of an authorisation to do so, cannot question the validity of the Act or a rule framed thereunder. Therefore since the order of the State Transport Appellate Tribunal in this case, amounts to a declaration that rule 134-AA is an invalid rule, as it suffers from the defect of improper delegation, it was beyond the jurisdiction of the State Transport Appellate Tribunal to give such a decision.

I therefore allow the writ petition and issue a writ of *certiorari* quashing the order of the State Transport Appellate Tribunal. No order as to costs.

V.M.K. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. S. KAILASAM.

C. S. Devasahayam .. *Petitioner**

v.

The Government of Madras by Its Chief Secretary (Public Service) Fort. St. George, Madras .. *Respondent.*

Fundamental Rules of the Madras Government, rule 56—Age of retirement of Government servant fixed at 55 excepting 9 categories of services—Dearth of officers and technical services—Classification, if could be sustained under Articles 14 and 16 of the Constitution of India (1950).

Rule 56 of the Fundamental Rules of the Madras Government provides that the date of compulsory retirement of Government servant is the date on which he attains the age of 55 years. But in respect of nine categories of services the age of superannuation was raised from fifty-five to fifty-eight years.

Is the order retiring the petitioner (not belonging to the excepted services), on his attaining the age of 55, discriminatory?

Held that, construing the provisions of Articles 14, 15 and 16 of the Constitution of India, it is clear that a Government servant is entitled to equality of treatment in respect of matters relating to employment under Article 16 (1) and

1. (1966) 1 I T J. 415 (1966) 1 An W R. 1 S C J 515 (1966) 17 S T C. 418 (1966) (S.C.) 108 (1966) 1 M L J (S C) 108 . (1966) 2 S C R 229.

* W.P. No. 171 of 1967. 1st February, 1968.

that would include the provision as to leave, as to gratuity, as to pension and as to the age of superannuation. The person adversely affected is entitled to challenge any order on the ground of discrimination But its validity can be sustained if two tests are satisfied. The first test is that the classification on which it is founded must be based on an intelligible differentia which distinguishes persons or things grouped together from others left out of the group and the second test is that the differentia in question must have a reasonable relation to the object sought to be achieved by the rule or statutory provision in question

In this case, the differentiation relied on by the Government in the case of services, except categories 2 and 7, is dearth of qualified persons in the services. It cannot be said that there is any dearth of officers in the service to which the petitioner belongs *i e*, Commercial Taxes Department This is an intelligible differentiation and has to be accepted as valid classification As in category No 7, the service to which the petitioner belonged cannot be said to be a technical service. In category 2, treating the State Higher Judicial Service on a par with the officers of the I.A S cadre and raising the age, is an adequate and valid ground for classification. The second test is also satisfied, because the object sought to be achieved is efficient public service and this could be achieved only by retaining persons in service when there is a dearth of persons applying for those posts Therefore, the order of the State Government retiring him on attaining the age of 55 has to be sustained

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to call for the records in G O Rt No 295 (Rev Dept) dated 30th March, 1966 of the Government of Madras and to issue a writ of *mandamus* directing the Government of Madras to continue the services of the petitioner in the Commercial Tax Department with all the privileges until he reaches the age of 58.

M. V. Krishnan, for Petitioner.

The Advocate-General and *T Selvaraj*, for Government Pleader, for Respondent

The Court made the following

ORDER.—The Writ Petition is filed by a retired Deputy Commissioner of Commercial Taxes for the issue of a writ of *mandamus* directing the Government of Madras to continue the service of the petitioner in the Commercial Taxes Department until he reaches 58 years of age.

The Petitioner joined the service of the Government of Madras in the Revenue Department on 16th February, 1931. In 1948, he opted to the Commercial Taxes Department where he served for about 18 years On attaining the age of 55, he was retired from service on 25th April, 1966 The order retiring the petitioner is challenged on the ground that it is discriminatory, in that, while the servants of the Central Government are retired only at the age of 58, the State Government servants are forced to retire on attaining 55 years, and that even regarding the State Government Service, while in the case of certain departments, the age of retirement is 58, the members of the service belonging to the petitioner's department are obliged to retire at 55 years It is contended that this amounts to unfair discrimination and not valid in law.

Rule 56 of the Fundamental Rules of the Madras Government provides that the date of compulsory retirement of Government servant is the date on which he attains the age of fifty-five years The State of Madras examined the question of increasing the age of retirement of its employees to fifty-eight as had been done by the Central Government and decided that the age of superannuation of the State Government servants should remain at 55 But in respect of certain categories, in modification of the policy of retiring the Government servants at fifty-five, raised the age of superannuation from fifty-five to fifty-eight by issuing suitable amendments to govern such services. The list of services for which the age of retirement was

raised to fifty-eight is given in para. (4) of the supplemental counter-affidavit filed on behalf of the respondent. Nine categories of services are listed of which regarding the posts covered by categories (1), (3), (4), (5), (6), (8) and (9) the main reason given for the extension of the age of superannuation is that there was dearth of qualified persons. Regarding category (2), the reason given is that the members of the State Higher Judicial Service are treated on a par with the officers of the I.A.S cadre in the matter of pay, pension and retirement benefits, and since the Government of India have raised the age of I.A.S. and I.P.S. Officers to fifty-eight, the Madras Government have also raised the age of superannuation in respect of District Judges. In respect of category (7), the reason is that in order to enable the Government to utilise the services of the technically qualified and experienced persons, such extension was given.

The principle to be borne in mind by a Court in determining the validity of a statute on grounds of violation of Article 14 of the Constitution is laid down in *Ram Krishna Dalmia* v. *Justice Tendolkar*[1], The Supreme Court held that.

> "While Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (*i*) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (*ii*) that that differentia must have a rational relation to the object sought to be achieved by the statute in question "

Among other principles stated, the Court laid down,—

> "that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds; that the Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest; that while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation "

In *General Manager, Southern Railway* v. *Rangachari*[2], the Supreme Court while construing the extent of protection under Article 16 of the Constitution of India, held thus :—

> "Thus construed it would be clear that matters relating to employment cannot be confined only to the initial matters prior to the act of employment. The narrow construction would confine the application of Article 16 (1) to the initial employment and nothing else; but that clearly is only one of the matters relating to employment The other matters relating to employment would inevitably be the provisions as to the salary and periodical increments therein, terms as to leave, as to gratuity, as to pension and as to the age of superannuation. ..... In this connection, it may be relevant to remember that Article 16 (1) and (2) really give effect to the equality before law guaranteed by Article 14 and to the prohibition of discrimination guaranteed by Article 15 (1) The three provisions form part of the same constitutional code of guarantees and supplement each

1. (1959) S C J 147 (1959) 1 An.W R (S.C) 67 (1959) 1 M L J (S C) 67 A I.R 1958 S C 538 (at 547, 548)

2. (1961) 2 S C J 424 (1961) 2 An W R (S C) 71 (1961) 2 M L J (S C) 71 (1962) 2 S C.R. 586 at 596. A I R 1962 S C 36

other. If that be so, there would be no difficulty in holding that the matters relating to employment must include all matters in relation to employment both prior, and subsequent, to the employment which are incidental to the employment and form part of the terms and conditions of such employment."

Construing the provisions of Articles 14, 15 and 16 of the Constitution of India, it is clear that a Government servant is entitled to equality of treatment in respect of matters relating to employment under Article 16 (1) and that would include as pointed out by the Supreme Court in the *Rangachari's case*,[1] the provision as to salary, periodical increments, terms as to leave, as to gratuity, as to pension and as to the age of superannuation The person adversely affected is entitled to challenge any order on the ground of discrimination But its validity can be sustained if two tests are satisfied. The first test is that the classification on which it is founded must be based on an intelligible differentia which distinguishes persons or things grouped together from others left out of the group and the second test is that the differentia in question must have a reasonable relation to the object sought to be achieved by the rule or statutory provision in question. The age of retirement of State Government servants is fixed as fifty-five. But as regards certain services in the State service the age of superannuation was increased to fifty-eight The object of such increase is to secure efficient public service. The question is whether the classification which distinguished persons grouped together from others was based on an intelligible differentia. The differentiation relied on by the Government in the case of services, except categories 2 and 7 mentioned in the supplemental counter-affidavit, is dearth of qualified persons in the services It cannot be said that there is any dearth of officers in the service to which the petitioner belongs. This is an intelligible differentiation and has to be accepted as valid classification Regarding category No 7, the reason given is that the extension was given to enable the Government to utilise the services of the technically qualified and experienced persons. The service to which the petitioner belonged cannot be said to be a technical service. In the case of category No 2, the extension was granted as the members of the State Higher Judicial Service are treated on a par with the officers of the I. A S cadre in the matter of pay, pension and retirement benefits, and as the Government of India have raised the age of I. A. S. and I P. S. to fifty-eight, the Madras Government have also raised the age of superannuation in respect of District Judges. This is an adequate and valid ground for classification. The second test is that the differentia in question must have a reasonable relation to the object sought to be achieved by the rule or statutory provision in question. The object sought to be achieved is efficient public service, and this could be achieved only by retaining persons in service when there is a dearth of persons applying for those posts On those grounds, I am unable to accept the contention of the learned Counsel for the petitioner that the order of retirement of the petitioner is unsustainable

The learned Counsel relied on the decision in *Pandurengarao* v. *Andhra Pradesh P S. Commission*[2], wherein it was held by the Supreme Court that:—

"as this rule has introduced a classification between one class of Advocates and the rest, and the said classification must be said to be irrational in asmuch as there is no nexus between the basis of the said classification and the object intended to be achieved by the relevant scheme of rules, rule 12 (*h*) and the corresponding portion of paragraph 4-A (1) of the notification based on it are unconstitutional and *ultra vires*"

The decision is not applicable to the facts of the case as it has been held in this case that the classification is justified Learned Counsel relied on the decisions of the Supreme Court in *Shivacharana* v. *State of Mysore*[3], and *Bishun Narain* v *State of Uttar Pradesh*[4] In the former decision, it was held that Note 1, to rule 285 applied

1 (1961) 2 S C J 424: (1961) 2 A W R (S C) 71 (1961) 2 M L J (S C) 71 (1962) 2 S C R 586 at 596 A.I R 1962 S.C. 36

2 A I R 1963 S C 268

3. A I R 1965 S C 280.

4 (1965) 2 S C J 718 A I R 1965 S C 1567.

to all Government Servants and as such was not open to challenge under Article 14 or Article 16 (1) of the Constitution In the latter case it was held that the impugned notification was not discriminatory, for, it had treated all public servants alike and fixed 31st December, 1961 as the date of retirement for those who had completed fifty-five years, but not fifty-eight years upto 31st December, 1961 In the two cases referred to above, there was no discrimination, as the order was made applicable to all Government servants But when it is not made applicable to certain classes of public services, it will have to be considered whether the classification is reasonable and answers the tests laid down by the Supreme Court as stated above. It has been found in this case that the tests were satisfied The two decisions of the Supreme Court cited by the petitioner will not be of any help to him

In the result, all the contentions of the petitioner will have to be rejected. This petition is accordingly dismissed No order as to costs

V.M K. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE M. NATESAN

G S.T. Shaik Mohideen Sahib .. *Appellant**

v.

The State Wakf Board, Madras and another .. *Respondents.*

Muslim Wakfs Act (XXIX of 1954), *section* 5—*Darga, meaning of—Tomb of saint—Ceremony of* Fateha—*Plaint darga not a private family darga—If properly included in the list of wakfs under section* 5 *of the Act.*

The main question for determination was whether the plaint darga was a private family darga, and should not have been included in the list of wakfs in the Madras State, under section 5 of the Muslim Wakfs Act, 1954 (XXIX of 1954)

Held, that the palli in question has been in existence over hundreds of years. A festival is conducted every year. There is a *Fateha* house *Urs* is conducted and *Moulood* is recited for 18 days Muslim public participate in *Moulood* and singing of what are known as Gnaniar hymns. Disciples come to the darga in a considerable number. They are given rice for their food during their stay, out of the darga funds The anniversary of the Gnaniar is celebrated on the 14th of Jamathil Aval and the offerings are distributed to the public

There is nothing in the Muslim Wakfs Act, 1954 limiting the listing of wakfs wholly to public wakfs For a darga, there must be tomb in which a saint is buried The plaintiffs themselves are referring to present institution as a Darga. The present tomb cannot be said to be the tomb of a private individual He was a person whose descendants take the name of Gnaniar and command a large body of disciples. The tomb has been held in great veneration and even the plaint ffs did not seriously dispute that Gnaniar Sahib whose mortal remains are interned there, was a saint. The tomb of a recognised saint is a proper subject of wakf.

The ceremony of *Fateha* consists in the recital of prayers for the welfare of the souls of deceased persons, accompanied by distribution of alms to the poor. Once it is admitted there is *Fateha*, it must be taken that there is a valid wakf under Mohamedan Law. In the present case, it is not a case of mere reading of *Koran* at the tomb ; there is *Fateha* and feeding of the poor. Therefore, it must be held that the plaint Darga was validly included in the list of wakfs under section 5 of the Muslim Wakfs Act of 1954

Appeal against the decree of the District Court of Kanyakumari at Nagercoil in Appeal Suit No. 45 of 1961, preferred against the decree of the Additional Subordinate Judge of Nagercoil in Original Suit No. 10 of 1960.

*S A No 1314 of 1962 16th September, 1966.

S. M Amjad Nainar and *A S Hassan*, for Appellant.

M M Ismail and *M A Sathar Sayeed*, for Respondents.

The Court delivered the following

JUDGMENT —This second appeal has been preferred by the second plaintiff in a suit for declaration that the plaint Darga, known as the Hazarath Gnaniar Sheikh Mohideen Maluk Mudaliar Sahib Oliyullah Darga of Kottar,Vadiweeswaram village, Agastheswaram taluk, Kanyakumari district, was a private family Darga, and should not have been included in the list of wakfs in the Madras State, under section 5 of the Muslim Wakfs Act, 1954 The first plaintiff in the suit claims to be Sajjadhanishin of the Darga and the second plaintiff is the Secretary of the Darga The Madras State Wakf Board is the party defendant in the suit The learned Subordinate Judge, who tried the suit, accepted the plaintiff's case that the dedication of the Darga and its properties is for the upkeep of the tomb of a private person and that, in the circumstances, there cannot be a valid wakf under the Mohammedan Law It was observed that the Darga is a family Darga, and that the dedication, even assuming that it had been made out, was only for the annual commemoration of the date of demise of a private person, and that however holy that person might have been considered by the members of his family and his disciples, he could not be deemed to be a saint Reciting Koran near the tomb in the Darga or performing fatehas, according to the learned Subordinate Judge, will notconstitute a religious, pious or charitable act for a wakf under the Mohammedan Law The learned Subordinate Judge followed the decision of this Court in *Kaleloola Sahib* v *Nuseerudeen Sahib*[1], as still good law.

On appeal the learned District Judge of Kanyakumari held that the plaint Darga is a place where the saint Sheik Mohideen Maluk Mudaliar Oliyullah Sahib had been burried, that he was a learned person, who had a number of disciples both in and out of Nagercoil who had endowed properties for the maintenance of the Darga and for charities to be performed therein, and that the plaintiff's predecessors-in-title had not, in earlier proceedings disputed that Sheik Mohideen Maluk was a saint On the findings he concluded that the Darga was validly included in the list of wakfs

In this Court, again the attempt was to invalidate the wakf by a reference to *Kaleloola Sahib* v *Naseerudeen Sahib*[1] It was further contended that it had been conclusively established in an earlier litigation that the Darga was a private family Darga of the plaintiffs and that there was no such dedication for religious pious or charitable purposes, as would make the institution a wakf for being listed under the Musl m Wakfs Act of 1954 It suited the plaintiffs to question the finding of the appellate Court that their remote ancestor was a saint, who had been acknowledged as such by the Muslim community, and it was argued that the dedication was for the purposes of conducting of *fateha* and *urs* an annual festival in commemoration of death, and, therefore, an invalid wakf.

I may at once say that there appears to be considerable confusion as to the scope of the Muslim Wakfs Act of 1954, as will presently appear in the course of the discussion. The Muslim Wakfs Act (XXIX of 1954), is made applicable to all wakfs, whether created before or after the commencement of the Act Wakf is defined in section 3 (1) *Wakf* means the permanent dedication by a person professing Islam of any movable or immovable property for any purpose recognised by the Muslim Law as pious, religious or charitable and includes (i) a Wakf by user, (ii) grants (including *mashrut-ul-khidmat*) for any purpose recognised by the Muslim Law as pious, religious or charitable; and (iii) a *Wakf-alal-Aulad* to the extent to which the property is dedicated for any purpose recognised by Musl m Law as pious, religious or charitable I fail to see anything in the Act limiting the listing of wakfs to wholly public wakfs. While a public wakf is one for public, religious, or charit-

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1 (1894) I L R 18 Mad 201 5 M L J 40

-able objects, a private wakf is one for the benefit of the settlors' family and his descendants and is called a *Wakf-alal-Aulad*. At one time it was considered that to constitute a valid wakf there must be a dedication of property solely to the worship of God or to religious or charitable purposes, *i.e.*, in no case could private wakf be valid. After the Wakf Act of 1913, this view is no longer terable, and, while a wakf exclusively for the benefit of the settlor's family, children and descendants in perpetuity will be invalid, after the Mussalman Wakf Validating Act of 1913, it is made lawful for a person professing the Muslim faith to create a wakf, which, in all other respects, is in accordance with the provisions of the Mohammedan Law, among other purposes for the maintenance and support wholly or partially for his family, children or descendants, provided that the ultimate benefit in such cases expressly or impliedly is reserved for the poor or for any other purpose recognised by the Muslim Law as a religious, pious or charitable purpose of a permanent character. The Act permits even the postponing of the ultimate benefit till the extinction of the family of the person creating the wakf. But there must be an ultimate gift for religious, pious or charitable purpose. But most often one finds a concurrent gift to religious, pious or charitable purposes of a permanent character recognised by the Muslim Law. Act XXIX of 1954, specifically includes in the definition of wakf, a *Wakf-alal-Aulad* to the extent to which the property is dedicated for any purpose recognised by the Muslim Law as religious pious or charitable, and, if in any particular wakf there are private rights existing it may be a matter for allocation of the income after the enquiry. It may be necessary to find out the extent of the dedication for pious, religious or charitable purposes for determining the wakf falling under the Act. Circumstances may necessitate the framing of a scheme for the said purpose. But certainly these features cannot stand in the way of the wakf being listed. There can be no valid wakf under the Muslim Law if there is no dedication, concurrent or at least in the ultimate, for purposes recognised by the Muslim Law as pious, religious or charitable.

The Darga in question is called the Gnaniar Palli. It is stated for the appellant that there is a private burial ground adjoining the Darga. The history of the Darga and its character have to be culled out only from the judgment relating to the Darga in Original Suit No. 44 of 1098 M.E. of the District Court, Nagarcoil confirmed on appeal by the High Court at Travancore in Appeal Suit No. 152 of 1102 M.E., Exhibits A-1 and A-2 in the case. The suit was instituted by some of the villagers claiming that the suit property and mosque belonged to the villagers. Gnaniar Palli, the Darga in question, is referred to as a mosque. It is seen from the records that even then it was not clear when the property, on which the Gnaniar Palli stood, was acquired, or when and by whom the Palli in question was built. It appeared to have been in existence for over hundred years even then. It was found by the trial Court in that case that the defendants claimed the mosque and its properties as belonging exclusively to their family saint. The senior member of their family was treated as owning the mosque. Finding that the defendant's family had been in exclusive possession of the Palli and its site, claiming special rights, the suit was dismissed. The case of the present plaintiffs in defence in that suit was that their family members were known as *Gnaniars*, that their ancestor, Sheik Mohideen Maluk Mudaliar Gnaniar Oliyullah Sahib lived a saintly life, and according to his direction his remains were interned in the plaint property by his brother and a Mosque built by Gnaniar Sheik Uthuman Sahib. Thereafter, it is stated that the family was performing the *Nercha*. Evidence had been let in, in that suit, and accepted by the Court, that respectable disciples of the chief of the defendants, family had endowed properties for the mosque and given valuable presents out of veneration for their Guru.

In the list of wakfs published under section 5 of the Act only the Darga is mentioned. Its properties are not found added even in a general way, leave alone specification. As it is, the Darga proper only has been listed. The properties which have been gifted or granted for the Palli would also be wakf, but they have

not been listed or specified. True, in the enquiry that preceded the listing when assessing the income, several properties have been taken into consideration. But, as it is, the list refers only to the Darga, and the plaintiffs pray for the deletion of the Darga from the list of wakfs. It has become necessary to refer to this aspect of the matter, as it is impossible to state, on the record, the exact nature of the dedication as regards properties other than the Darga and whether there is an out and out dedication of the various properties. In the written statement of the Wakf Board it is stated that the Darga now owns about 10½ acres of wet land, about 5¼ acres of dry land, and house properties and that these properties are all permanent dedications made by Muslims of different places in favour of the Darga. Both the Courts below have not addressed themselves to this aspect of the question, whether and what properties have been dedicated in favour of the Darga for pious, religious or charitable purposes. In section 27 of the Wakf Act of 1954, there is provision for decision on questions as to whether a property is wakf property. The Board may itself collect information regarding any property which it has reason to believe to be wakf property, and if any question arises whether a particular property, is wakf property, or not, or whether a wakf is a Sunni Wakf or a Shia Wakf, it shall refer the question to a civil Court of competent jurisdiction The only point that has been considered in this case in the Court below is whether the plaint Darga is a wakf as defined in section 3 (*b*) of the Muslim Wakfs Act. I am clarifying this position, in view of certain apprehensions expressed on behalf of the plaintiffs particularly as it is their contention that the wakf with its properties is a private one. The learned District Judge has observed that in view of the findings in the earlier suit relating to the same Darga, it must be held that the properties were endowed not only by the relations of the plaintiffs, but also by the disciples of the Gnaniar residing in other districts for the benefit of the Darga and that he was unable to agree with the finding of the Court of first instance that there has been no valid dedication of properties in favour of the Darga.

It now falls for consideration whether there can be a valid dedication for the Darga and whether the several practices which have been referred to by the learned Subordinate Judge *Fateha* and *Urs* ceremonies invalidate the dedication. The principal contention of the plaintiffs has been that the Darga cannot be considered to be a wakf, as it was a tomb of a private person, and that there could be no provision for reading of Koran at the tomb. Now it is brought out in the evidence of P.W. 1 that no one is prevented from entering into the Darga and that no one takes permission, though according to P.W. 1 they must take the plaintiff's permission. Properties, houses and topes have been purchased for the Darga. A festival is conducted every year in Jathil Aval. There is a *Fateha* house. *Urs* is conducted and Moulood is recited for 18 days Muslim public participate in Moulood and the singing of what are known as Gnaniar hymns Disciples come to the Darga from Erwaday and Melapalayam in a considerable number. They are given rice for their food during their stay, out of the Darga funds. The anniversary of the Gnaniar is celebrated on the 14th of Jamathil Aval and the offerings are distributed to the public, about 1,000 in number. Ten to sixteen kottahs of rice are cooked. *Hundial* is taken in procession, and any one may make offerings in money and put it into the *hundi*. It is stated that only family members and disciples are invited for the purpose. When the income and the properties set apart are insufficient, personal funds are spent by the members of the family. Fateha on the 30th of Ramzan and on the 22nd day of Muharam is celebrated, and it is stated to be celebrated out of their own funds. The family of the plaintiff's it is stated, consists of about 400 members.

The learned Counsel for the appellant drew my attention to the decision of this Court in *Kunhamutty* v. *Ahmad Musaliar*[1], and referred again to *Kaleloola Sahib* v. *Nuseerudeen Sahib*[2]. No doubt, in *Kunhamutty* v. *Ahmad Musaliar*[1], it has been held

1 (1934) I L R 58 Mad 204 68 M.L J 107 2. (1894) I.L R. 18 Mad. 201 · 5 M.L J. 40.

that the dedication of property, the income of which is to be devoted merely for the purpose of reciting Koran over the tomb of a private person, does not create a val d wakf under the Mohamedan Law But certainly it cannot be contended that the Gnaniar, whose mortal remains have been interned in the Darga, was an ordinary private person Even otherwise, it has been held that the performance of *Fateha* ceremonies is a valid object for a wakf The ceremony of *Fateha* consists in the recital of prayers for the welfare of the souls of deceased persons, accompanied by distribution of alms to the poor Once it is admitted that there is *Fateha*, it must be taken that there is a valid wakf under the Mohamedan Law The very decision in *Kunhamutty* v *Ahmad Musaliar*[1], relied upon by the appellant, points out that *Kaleloola Sahib* v *Nuseerudeen Sahib*[2], is no longer good law, after the decision of the Judicial Committee in *Ramanandan Chettiar* v *Vava Levai Marakayar*[3] The case, *Kaleloola Sahib* v *Nuseerudeen Sahib*[2], was before the Musalman Wakf Validating Act (VI of 1913) In the institution now under consideration it is not a case of mere reading of *Koran* at the tomb, there is *Fateha* and feeding of the poor.

Learned Counsel for the appellant also, referred to *Zooleka Bi Bi* v *Syed Zynul*[4], where it has been held that the Mohamedan Law does not justify the tying up of property for the purpose of maintaining the tombs of ordinary individuals The same decision recognizes that property could be tied up with respect to shrines and tombs of great religious teachers which are regarded with very considerable feeling of reverence and sanctity by various Muslim Communities throughout the world It is pointed out in *Syed Shah Abdul Latif* v *Md Lebbai*[5], that for a Darga there must be tomb in which a saint is burried The plaintiffs themselves are referring to the institution in question as a Darga In the Oxford Dictionary Volume III, Part III, *Darga* is defined as a place of religious resort and prayer, and also as a shrine of a saint To the same effect is the meaning given to Darga in the Tamil Lexion, Volume III, Part I, at page 1760 The present tomb cannot in the circumstances. be said to be the tomb of a private individual He was a person whose descendants take the name of Gnaniar and command a large body of disciples The tomb has been held in great veneration, and the learned District Judge notices that even the plaintiffs did not seriously dispute that Sheik Mohideen Maluk Mudaliar Gnaniar Sahib was really a saint. The learned Subordinate Judge in this case has discountenanced the celebration of *Urs* at the death anniversary as not one in accordance with the tenets of Islam But in *Sujjada Shah* v. *Shaw Habit*[6], Abdul Rahim, J. sitting with Seshagiri Aiyar, J, remarks:

"I ought to mention that the performance of *Urs* and *Fatehas* has not been objected to in this case and Benson, J, and myself held in the above-mentioned case in *Ramanadhan Chettiar* v *Veda Levvai Marakayar*[7], that such objects are valid according to the Mohamedan Law as administered in India, if these rites involve the distribution of food to the poor"

The learned Judge refers to the fact that *Ramanandan Chettiar* v. *Veda Levvai Marakayar*[7], has been confirmed by the Judicial Committee in *Ramanandan Chettiar* v. *Veva Levai Marakayar*[3].

No doubt *Zooleka Bi Bi* v. *Syed Zynul*[4], has discountenanced the valid dedication for *Urs* anniversary ceremonies, but I am bound by the decision of this Court above referred to, and I may, in this connection mention that Mirza, J, in *Mt Azimunnissa Begum* v. *Sirdar Alikkan*[8], points out that the question of sainthood must rest upon the beliefs of the people The learned Judge remarks:

"The *Fateha* ceremony on the anniversary of the death of a saint is called by the more dignified name of *Urs* as much larger section of the Musalman public

1. 68 M.L J 107 (1934) I L R 58 Mad 204
2. (1894) I L R. 18 Mad 201 5 M L J 40
3. L.R 44 I A 21 : 32 M.L J. 101 (1916) I.L R 40 Mad 116 (P C.)
4. (1904) 6 Bom.L R 1058.
5. (1958) 2 M L J 199
6. (1919) 53 I C 677, 681.
7. (1910) I L.R 34 Mad. 12 20 M.L J. 254.
8. A.I.R. 1927 Bom. 387, 390.

participate in the ceremony and the ceremony itself is on a larger scale. In matters of this kind Courts of law are not primarily concerned with what may be the true tenets and practice of a religion as propounded by its founder, but they have to take into consideration the tenets and practice of the religion as understood and practiced by the people professing such religion in the country where the Courts are administering the law According to that practice and belief it would appear that in this country at least the anniversary *Fateha* or *Urs* ceremonies at the tombs of ordinary individuals and specially of saints form an integral part of the religious life of the general body Mahomedans."

Reference may also be made to the decision in *Abdul Sattar* v *Abdul Hamid*[1] Here again it has been pointed out that the decision in *Kaleloola Saheb* v. *Nuserudeen Sahib*[2], could no longer be considered to be good law Reference was made to the decision of this Court and of the Judicial Committee in *Ramanadan Chettiar* v. *Vava Levvai Marakayar*[3], where it has been pointed out that part of the *Fateha* ceremony involved the feeding of the poor, a valid object of wakf It is surprising that in spite of this line of decisions, the learned Subordinate Judge should have placed reliance on the decision in *Kaleloola Sahib* v. *Nuserudeen Sahib*[2]

Reference may also be made to *Maher Husein* v *Alimahomed*[4], where it is noticed that the tomb of a recognised saint is a proper subject of wakf In that case a dedication was inferred from the user

It follows that the decision of the learned District Judge, that the plaint-Darga was validly included in the list of wakf under section 5 of the Muslim Wakfs Act of 1954, is unimpeachable.

A question of jurisdiction has been raised, learned Counsel contending that the State Wakf Board constituted by the State of Madras, has no jurisdiction over the wakf which was in the District of Kanyakumari, the Muslim Wakfs Act of 1954 is a Central Act, and by section 1 (3) it is provided that the Act shall come into force in a State to which the Act extends on such date as the Central Government may, by notification in the Official Gazette, appoint in that behalf for that State. The Act came into force in the State of Madras, by virtue of a notification under section 1 (3), on the 15th January, 1955. In the State of Travancore-Cochin it came into force on 1st February, 1955 The State Reorganisation Act, (XXXVII of 1956), was passed on 1st November, 1956, making the District of Kanyakumari part of the Madras State. The State Wakf Board under section 9 of the Act (XXIX of 1954) was constituted even in the State of Madras only in 1958 There was no Wakf Board in the State of Travancore-Cochin before 1st November, 1956, *i e*, there was no State Wakf Board functioning in the District of Kanyakumari when it was transferred to the State of Madras. In the circumstances the reliance by the learned Counsel for the appellant on section 109 of Act XXXVII of 1956 cannot stand. Section 109 (1) runs thus:

"Save as otherwise expressly provided by the foregoing provisions of this part, where any body corporate has been constituted under a Central Act, State Act or Provincial Act for an existing State the whole or any part of which is by virtue of the provisions of Part II transferred to any other existing State or to a new State, then, notwithstanding such transfer, the body corporate shall, as from the appointed day, continue to function and operate in those areas in respect of which it was functioning and operating immediately before that day, subject to such directions as may from time to time be issued by the Central Government, until other provision is made by law in respect of the said body corporate"

The State Wakf Board was not functioning in the District of Kanyakumari before its transfer to the State of Madras and hence there can be no question of want of

1 (1944) 2 M L J 92 : I L R (1945) Mad 276.
2. (1894) I L.R 18 Mad 201 5 M L J 40.
3 L R 44 I A 21 32 M L J 101 : (1916) I.L.R 40 Mad. 116 (P.C)
4 A I.R. 1934 Bom 257.

jurisdiction in the Wakf Board of this State by reason of section 109 The State of Madras and the District of Kanyakumari were both governed on 1st November, 1956, by the Wakfs Act (Central). The Wakf Act of 1954, was in force not only in the existing State of Madras, but also in the transferred territory of Kanyakumari District It is under those circumstances that the State of Madras under section 9 of the Wakfs Act (Central), constituted the Wakf Board in the State for the entire State I fail to see how the Board can be denied jurisdiction over the District of Kanyakumari. The question, it may be stated, is covered by the decision of my learned brother Srinivasan, J, in *State Wakf Board* v. *Hussain and others*[1] This point, therefore, fails.

On behalf of the State Wakf Board a contention was raised that the suit itself was barred by limitation There are no merits in this contention The notification under section 5 (2) was published on 3rd November, 1958 The statutory notice under section 56 of the Wakfs Act was sent on 26th November, 1959 A suit under section 56 could be instituted only after the expiration of two months next after notice in writing has been delivered to, or left at, the Office of the Board. The suit in this case was actually filed on 3rd February, 1960, on a Monday. The previous day was a holiday, being a Sunday Naturally, in the circumstances the question of limitation was not argued in the Court of first instance However, it has been raised in the appeal, and here again in the Second Appeal The ground of limitation is untenable

In the result, the Second Appeal fails and it is dismissed. In view of the untenable defence of limitation taken for the respondent there will be no order as to costs in the Second Appeal No leave.

V.M.K. ——— *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T RAMAPRASADA RAO.

S Chattanatha Karayalar .. *Petitioner**

v.

Vaikuntarama Karayalar and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 32, rule 15—Appointment of a next friend to person incapable of managing his affairs—Duty of Court—Necessity of a judicial enquiry—Appointment of next friend to deaf and dumb person without any enquiry—Legality

Appointment of a guardian or next friend to a person who is incapable of managing his affairs is a serious inroad upon the litigant's right to carry on his suit. Such wedging of a personal right in a party cannot be deduced, inferred or even taken for granted because the other parties to the *lis* have no objection to such an appointment. The Court has a primary duty to perform in such circumstances. It has to judicially enquire whether it is necessary in the interests of justice. Mere and sole reliance upon the wishes and sentiments expressed by the other parties to the suit would neither be a guide or a safe guide. The Court cannot dispense with the judicial enquiry contemplated under Order 32, rule 15 and render a clear finding that the person concerned, by reason of his infirmity, either physical or mental, is incapable of protecting his interests. The holding of such an enquiry is thus inescapable and consent cannot vest jurisdiction in Court to dislodge or divest the right of a litigant to conduct his suit, by superimposing a guardian or a next friend.

Thus, a person who is deaf and dumb and characterised as suffering from a mental infirmity, cannot be taken for granted as one who should be represented

1. S A. No. 185 to 187 of 1963.

* C.R.P. No. 1364 of 1965. 17th February, 1967.

by a next friend An enquiry and indeed a proper enquiry with the assistance of medical experts is called for. Such an enquiry can be held even at the appellate stage

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Sub-Court, Tirunelveli, in I A No. 149 of 1965 in O S No 33 of 1961

T Hariharan, for Petitioner

R Gopalaswamy Ayyangar, for Respondents

The Court delivered the following

JUDGMENT —The first defendant is the petitioner The relevant facts necessary for purposes of this case may be summarised as follows The first defendant filed I.A. No. 374 of 1962 in the Court of the Subordinate Judge, Tirunelveli, under Order 3, rule 1, Order 32, rule 15, Order 26, rule 1, and section 151, Civil Procedure Code, for the examination of the first plaintiff by a medical expert to ascertain his mental condition and to find out whether he is capable of managing his affairs. Apparently this application was taken by the first defendant with the object of appointing a next friend or guardian to the first plaintiff under Order 32, rule 15, Civil Procedure Code This application was opposed by the first plaintiff and his brother the second plaintiff In the counter filed, the first plaintiff avers that " the plea that he should be represented by a next friend is a malicious one and that it is not *bona fide* ". He has also produced their family doctor's certificate to show that the allegations of the first defendant are false In the main, the first plaintiff's contention is that there is no mental infirmity in him and that he is capable of managing his affairs or that of the joint family consisting of himself and his two sons. He would add that no next friend is necessary Thereafter the first plaintiff's sons applied for impleading themselves as parties to the suit During the pendency of this application, one of the first plaintiff's sons Subramaniam whom I shall refer to by name hereafter, filed I.A. No. 149 of 1965 under Order 32, rule 15 to be appointed as next friend of his father. Subramaniam reiterates that though his father, the first plaintiff, requires no guardian under Order 32, rule 15, he is applying for the same without prejudice and in order to obviate delay and in view of the attitude of the first defendant. This application I.A. No. 149 of 1965 was opposed by the first defendant on two grounds; firstly, that unless there is a candid admission that the first plaintiff is by reason of the mental infirmity, incapable of managing his affairs and second unless there is a finding to that effect, on a judicial enquiry and investigation made by Court, and as envisaged under Order 32, rule 15, the application is incompetent.

One thing emerges from the above background as to facts of the case. The first plaintiff (the father) would swear that he is mentally alert and that the application for his examination by an expert is malicious and misconceived. He is prepared to conduct the litigation on his own though he is deaf and dumb and is of the opinion that anyone who is not intimately acquainted with him can reach his mind and interpret it. But his son Subramaniam would hesitantly say that without prejudice he would concede that his father is unable to manage his affairs and in order to avoid delay and protraction of the main suit, he would like to act as his father's next frined. These two irreconcilable and indeed contradictory stands taken respectively by the father and the son, do create a cloud of suspicion as to the capability of the first plaintiff to stand on his legs and conduct the litigation No doubt, the first defendant by applying for the examination of the first plaintiff by an expert, in I.A. No 374 of 1962 has taken a defined step towards the appointment of a guardian for the first plaintiff. He has also made indeed self-serving statements in the course of the proceedings that the suit is not maintainable without a next friend being appointed for the first plaintiff. Appointment of a guardian or next friend to a person who is incapable of managing his affairs is a serious inroad upon the litigant's right to carry on his suit. Such wedging of a personal right in a party cannot be

deduced, inferred or even taken for granted because the other parties to the *lis* have no objection to such an appointment. The Court has a primary duty to perform in such circumstances It has to judicially enquire whether it is necessary in the interests of justice. Mere and sole reliance upon the wishes and sentiments expressed by the other parties to the suit would neither be a guide or a safe guide. Even so, the fact that the first plaintiff is deaf and dumb cannot make a significant difference. In fact, the first plaintiff himself does not subscribe to the position that he is so incapable of managing his affairs. Notwithstanding the consensus of opinion amongst the other parties to the suit, the Court cannot dispense with the judicial enquiry contemplated under Order 32, rule 15 and render a clear finding that the person concerned, by reason of his infirmity, either physical or mental, is incapable of protecting his interests, in the suit The holding of such an enquiry is thus inescapable and consent cannot vest jurisdiction in Court to dislodge or divest the right of a litigant to conduct his suit, by superimposing a guardian or a next friend As was pointed out in *Narendra Lal Battacharya* v. *Bepin Chandra Battacharya*[1]·

" But the words of the rule require something more, namely, that it should be found on enquiry that by reason of unsoundness of mind or mental infirmity the person is incapable of protecting his rights as a plaintiff or as a defendant Such a finding will have to be arrived at and it must be arrived at upon an enquiry properly held "

In fact, Courts in England have taken a similar view, though strictly the rules therein do not contemplate an enquiry. Satyanarayana Rao, J , in *Mohamed Ibrahim* v. *Shaik Mohamed*[2], held :

" .... the Courts in England held that the Court had ample power to enquire into and adjudicate upon the question of the unsoundness of mind of either the plaintiff or the defendant as the case may be This was established by the decision in *Bowell* v *Lewis*[3], a Judgment of Kekewish, J. In that case the jurisdiction of the Chancery Court in such matters which was expounded with clearness by James, L.J. in *Beal* v *Smith*[4], was referred to as well as the decision in *Lee* v. *Ryder*[5]. The learned Judge observed at page 673 as follows :—

"Thereupon the Vice-Chancellor made the order, which is set out at the bottom of the page, and which, in short, directed an enquiry whether the defendant was competent to defend in his own person, or whether a guardian ought to be appointed. That seems to give me a guide to what I should do in this case."

In re *Periasami Goundan*[6], is a case of deaf and dumb person who was leading a family life. Even then a judicial enquiry was held before a next friend was appointed. In the decision in *Nanakchand* v. *Banarsidas*[7], quoted by the learned Counsel for the respondent, the question whether an enquiry under Order 32, rule 15, Civil Procedure Code, is mandatory, did not arise. In *Rami Reddy* v. *Papi Reddi*[8], Venkatesam, J., after reviewing the authorities, laid down the following principles :

" ......(1) Order 32, rule 15, Civil Procedure Code, places persons of unsound mind or persons so adjudged in the same position as minors for purpose of rules 1 to 14........(3) Where it is alleged that a party to a suit is of unsound mind, and the other party denies it, the Court must hold a judicial enquiry and come to a definite conclusion as to whether by reason of the unsoundness of mind or mental infirmity, he is incapable of protecting his interests in the suit. (4). Mental infirmity may even be due to physical defects, if it renders him incapable of receiving any communication, or of communicating his wishes or thoughts to others. (5) Whether a person is of unsound mind or mentally infirm for the

1. A I R. 1936 Cal 224.
2. I.L.R. (1949) Mad. 343 (1948) 2 M L J. 277 : A.I.R. 1949 Mad. 292
3. (1892) 65 L T. 672 . 61 L J Ch 89.
4. (1878) 9 Ch. 85, 29 L.T. 625.
5. (1822) 6 Mad 295, 56 E R 1103.
6. A.I.R. 1954 Mad 810.
7. A I.R. 1930 Lah. 425
8. (1962) 2 An W.R 337 . A I R 1963 Andh. Pra. 160.

purpose of the rule and the extent of the infirmity has to be found by the Court on enquiry, (6) Where the question of unsoundness of mind arises not only under Order 32, rule 15, Civil Procedure Code, but is also one of the issues in the suit, the Court has ample jurisdiction to enquire into that question, and for that purpose seek medical opinion... .."

I adopt with respect such guides as laid down by the learned Judge

A Division Bench of the Allahabad High Court in *Bhondumal* v. *Thomas Skinner*[1], took the view—

" Lunatics are under the peculiar probation of the Court, and from the mere fact that by reason of the ignorance of the Court no enquiry was made, the decree passed in the earlier suits cannot be said to be binding on the lunatic ".

The same principle would apply even to a person suffering from an infirmity and therefore unable to look after himself

From a review of the above judicial precedents, it is clear that a person who is deaf and mute and characterised as suffering from a mental infirmity, cannot be taken for granted as one who should be represented by a next friend An enquiry and indeed a proper enquiry with the assistance of medical experts is called for Such an enquiry, can be held even at the appellate stage, if such a question directly arises thereat. The learned Subordinate Judge instead of holding such an enquiry, was satisfied in appointing the son as the next friend of the ~ ther on the only ground that all other parties before him at one time or other are '·ng out that the first plaintiff is mentally infirm I have already referred to inconsistent positions taken by the concerned parties of whom the first plaintiff himself is one In this nebulous state of affairs, the order of the lower Court in appointing a next friend straightaway without the attendant enquiry to precede it is illegal and is without jurisdiction. The order of the learned Subordinate Judge is therefore set aside. The Civil Revision Petition is allowed with costs.

V.K. ——— *Petition allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. M. ANANTANARAYANAN, *Chief Justice.*

Manicka Gounder .. *Petitioner**

v.

Muniammal .. *Respondent*

Contract Act (IX of 1872), section 23—Past cohabitation amounting to adulterous intercourse—If good consideration for a promise to pay.

Where the consideration relates strictly to past cohabitation which is illicit, in the sense that it is outside matrimony, but which otherwise does not constitute any offence, it could be conceivably held, on the circumstances, that the promise to pay is supported by good consideration. But even so, the difficulty is obvious that, though this consideration is not forbidden by any law, nevertheless it falls under the interdict that it may be "immoral or opposed to public policy". For it is indisputable that the Courts must, by every means in their power, promote matrimony, and the incurring of lawful sexual relationship alone and Courts ought not to give sanction or approval, even in an implied form, to irregular sexual relationships outside the bond of matrimony, even where they may constitute no offence or infringement of the penal law. If the promise can be interpreted as an undertaking to pay for past services voluntarily rendered, then, presumably, the consideration would be good But if it is to be fixed or determined with regard to the fact of past cohabitation alone, then it would be doubt-

1 A I R 1937 All 29, 32

* C R.P No 826 of 1964 2nd March, 1967.

ful whether the Court would be justified in declining to apply the last category of section 23 to the contract, namely. "immoral or opposed to public policy."

Conflict in case-law discussed.

But, in any event, there can be no doubt whatever that where, as in the instant case, the illicit connection is adulterous intercourse, and, therefore, is opposed to law, it cannot possibly sustain a promise to pay or constitute a valid consideration. The hardship of the case, as far as the woman is concerned, can be no criterion even though the defendant might have been the person who tempted the woman into adultery

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Sub-Court, in A S. No. 113 of 1963—O S No 38 of 1962, District Munsif Court, Arni.

N R Raghavachari, for Petitioner.

P. S. Balakrishna Iyer and *P. S Ramachandran*, for Respondent

The Court delivered the following -

JUDGMENT —This Civil Revision Petition involves a question of law of considerable interest The facts would appear to be very clearly established, and to admit of little or no doubt.

As is well-known, section 23 of the Indian Contract Act (IX of 1872) declares that—

"The consideration or object of an agreement is lawful, unless—it is forbidden by law, or. . . , the Court regards it as immoral or opposed to public policy"

The section then proceeds to state that in each of the given categories 'the consideration or object of an agreement is said to be unlawful' Every agreement of which the object or consideration is unlawful is void

Very briefly stated, the revision petitioner is the defendant in a suit by a certain Muniammal, the plaintiff, to recover a sum of Rs 810 being the principal and interest due on a promissory note executed by the defendant in favour of the plaintiff The findings of the Courts below, as they stand at present, are that though there was no cash consideration *ex facie* appears on the instrument, the consideration for the document, Exhibit A-1 was past cohabitation between the parties The learned Additional Subordinate Judge has rejected the view of the trial Court, that any part of the consideration under Exhibit A-1 could possibly refer to future cohabitation But this cohabitation admittedly amounted to adulterous intercourse, since the plaintiff was a woman married to another, at all relevant periods.

The broad question, therefore, is whether illicit cohabitation could sustain a promise to pay Obviously, there are three possible categories of this aspect of an agreement or undertaking, whether in the shape of negotiable instruments or in other form Firstly, the promise could relate exclusively to future cohabitation. Secondly, the promise could relate exclusively to past cohabitation Thirdly, the promise could relate to past cohabitation with a woman whose husband is alive that is, adulterous intercourse.

Learned Counsel on both sides agree that with regard to promise to pay a woman for future cohabitation, this would be an agreement which the Court is bound to regard as immoral, or opposed to public policy. There would appear to be no difference in judicial opinion upon such an agreement, which is, therefore, void

It is with regard to the second category that there would appear to be an interesting divergence in the precedents. In *Dhiraj Kuer* v. *Bikramjit Singh*[1], the

1. (1881) I.L.R 3 All 787.

Bench held that past cohabitation would not be an immoral consideration, for a promise to pay a woman an allowance But, more properly, such a promise should be regarded as an undertaking by the promisor to compensate the promisee for past services voluntarily rendered In *Lakshminarayana Reddiai* v *Subadri Ammal*[1], judgment of White, C.J , and Bhashyam Aiyangar and Moore, JJ , it was held that a promise to pay for the purpose of future cohabitation, which comprised the consideration, was illegal and void But Bhashyam Aiyangar, J , observed that a promise made in consideration of past cohabitation would appear to be valid under the Indian Contract Act In *Namberumal Chettiar* v *Veeraperumal Pillai*[2], Ramesam, J , observed that past cohabitation could be good consideration, approving *Lakshminarayana Reddi* v *Subadri Ammal*[1] In *Kothandapani Muddaliar* v *Dhanammal*[3], Kunhiraman, J , pointed out that although future illicit cohabitation could not support a promise, for the reason that it was immoral consideration, yet, there was nothing wrong in a promise made in recognition of a claim based upon past cohabitation.

But contrary views have also been expressed In *Godfrey* v *Mt Parbati Paluni*[4], Courtney-Terrell, C J , seems to have been aware of the difficulty, and held that a contract to compensate a mistress for what she has lost on account of past illicit association with the promisor, might not be invalid But in *Hussainali Casan Mohamed* v *Dinbai*[5], Macleod, C J , and Crump, J , held that a contract which was immoral at the time, and therefore would not support an immediate promise to pay, did not become innocent by merely being past consideration

> " There can be no difference whether ' *A* ' says to ' *B* ' ' I will give you Rs. 100 a month if you live with me for a year ' or ' I will give you Rs 1,200 because you have lived with me for a year.' The consideration therefore for past cohabitation is unlawful as being immoral or opposed to public policy "

In *Kisandas* v. *Dhondu*[6], it was held that past cohabitation was not good consideration for transfer of property.

In *Ganapathi Chetti* v. *Sundararaja Pillai*[7], Sundaram Chetti, J., held, in a case where the consideration for a promissory note was past cohabitation of the executant with a dancing girl, that the claim under the note was unenforceable the consideration therefor being immoral within the meaning of section 23 of Contract Act. In Mulla on Contract Act, 8th edition, pages 174, 177 and 178, the cases have been discussed at some length In *Marakkal* v *Chinnana Gounden*[8], Ramaswami, J , held that in that case, the provision was also for future cohabitation, and the promise to pay maintenance was void, as being immoral and opposed to public policy

In my view, where the consideration relates strictly to past cohabitation, which is illicit, in the sense that it is outside matrimony, but which otherwise does not constitute any offence, it could be conceivably held, on the circumstances, that the promise to pay is supported by good consideration But, even so, the difficulty is obvious that, though this consideration is not forbidden by any law, nevertheless it falls under the interdict that it may be " immoral or opposed to public policy " For, I think it is indisputable that the Courts must, by every means in their power, promote matrimony, and the incurring of lawful sexual relationship alone, and Courts ought not to give sanction or approval, even in an implied form, to irregular sexual relationships outside the bond of matrimony, even where they may constitute no offence of infringement of the penal law Hence, in such a case I think that it could be contended, with great justice and force,

1 (1902) 13 M L J 7
2 (1927) 52 M L J 596
3 (1943) 1 M L J 56 A I R 1943 Mad 253.
4. A I.R. 1938 Pat 502
5 A I R 1924 Bom 155
6 A I R 1920 Bom 142
7. A I R. 1930 Mad 239
8 (1958) 71 L W. 137 (S N.).

that the test adumbrated by the Division Bench in *Dhiraj Kuer* v *Bikramjit Singh*[1] should be applied If the promise can be interpreted as an undertaking to pay for past services voluntarily rendered, then, presumably, the consideration would hold good But, if it is to be fixed or determined with regard to the fact of past cohabitation alone, then with great respect to the line of authorities to the contrary, I would greatly doubt whether the Court would be justified in declining to apply the last category of section 23 to the contract, namely, "immoral or opposed to public policy" It will be noted that Courtney-Terrell, C J, in *Godfrey* v *Mt Parbati Paluni*[2], also preferred to put in the form that a promise to pay in respect of past illicit connection, could presumably be justified, not in itself, but as a compensation for a mistress, where she had suffered, injury owing to the past association.

But, in any event, there can be no doubt whatever that where the illicit connection is adulterous intercourse, and, therefore, it is opposed to law, it cannot possibly sustain a promise to pay, or constitute a valid consideration This was pointed out by Ramaswami, J, in *Marakkal* v *Chinnanna Gounden*[3], in the form that, since adultery was an offence in this country, cohabitation, past or future, if adulterous, would be both immoral consideration and unlawful consideration. The matter was considered in detail in *Alice Mary Bill* v *William Clarke*[4] and the observations of Lindley, L J, in *Scott* v *Bres, Doering Mcnaband Co*[5]. to the effect that—

> "No Court ought to enforce an illegal contract, or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court and if the person invoking the aid of the Court is himself implicated in the illegality"

and of Lord Mansfield, L J, in *Holman* v *Johnson*[6], that the principle is not that the Court declines to enforce the contract for the sake of the defendant, but on the cannon of the law that "those who violate the law must not apply to the law for protection" have been cited with approval. The remarks are directly and strictly pertinent to the present context. The plaintiff (Muniammal) applies to enforce a contract, which is directly referable to the relationship, between her and the defendant, which is not merely illicit, but is criminal. It appears to be indisputable, for instance, that if '*A*' undertakes to pay a large sum to '*B*', in case '*B*' obliges '*A*' by committing some criminal offence, and '*A*' fails to pay '*B*', '*B*' cannot approach the Court for redress, claiming that he had committed the criminal offence, and that, therefore, he should receive his due wages therefor. The hardship of the case, as far as the woman is concerned, can be no criterion, upon facts of this character, even though the defendant might have been the person who tempted the woman into adultery.

The revision proceeding is, therefore, allowed, and the decree of the learned Subordinate Judge is set aside But, obviously, this is not a case in which the revision petitioner is entitled to costs, and I direct the parties to bear their own costs.

V.K. *Petition allowed.*

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1. I.L R (1881) 3 All. 787
2. A I.R 1938 Pat 502
3. (1958) 71 L W 137 (S N).
4. (1905) I L R 27 All. 266 at 270
5. L R (1892) 2 Q B 72
6. (1775) 1 Cowper 341.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE T VENKATADRI

M. C. Perumal Chettiar and others *Petitioners**

v

The Estates Abolition Tribunal (District Judge) Chingleput and others .. *Respondents.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), *section* 15 *—Inam village declared as inam estate—Landholder if precluded from applying for patta asserting that they are his private lands.*

Land tenure—Mirasi tenure of Chingleput district—Nature and incidents of—Inam village of Baburayampettai in Chingleput district—History, character of tenure and respective rights of Baburayampettai Devasthanam and the tenants to the lands

Even in an inam estate a landholder can own private lands and hence the fact that a village has been declared as an inam estate under the Estates Abolition Act and that that declaration has become final will not preclude the landholder from applying for a ryotwari patta under section 15 of the Act asserting that the lands are his private lands

If we take the circumstances under which the village of Baburayampettai in Chingleput district was granted as rent free shrotriem to the deity of Vijaya-varadarajaswami in the temple of the Baburayampettai Devasthanam, it is very clear that the original founder brought the villagers or tenants to clear the forest, reclaim the land and to settle down there and cultivate the lands These persons have been in continuous possession of the lands though the founder of the temple got the village assigned in favour of Sri Vijayavaradarajaswami These tenants were the first tillers of the soil It is true that the founder of the temple was instrumental in getting the lands assigned in the name of the temple But it does not mean that the temple has got both the melwaram and kudivaram Further the lands are situate in Chingleput district and the tenure is what is called the Mirasi tenure which is always a complicated and contested one It has given rise to doubtful rights in the mirasdar and the tenants as well.

(Meaning and incidents of Mirasi tenure discussed)

There is one factor, however, which has to be borne in mind that these tenants continued to live in the village from generation to generation cultivating the soil and dealing with the lands in their own right At no time was this objected to by the Devasthanam At no time did the temple authorities interfere with the ryot's mode of cultivation The burden of proof is on the landholder to establish that he has both the melwaram and kudiwaram right (*Vide* A I R. 1949 P C. 278). It cannot therefore be said that merely because the Devasthanam has been described as Ekabogam Mirasdar in some of the Muchilikas executed by the ryots, it possesses kudiwaram interest also. A mere recital in a document that a person was Ekabogam Mirasdar would not necessarily show that he was the owner of the entire kudiwaram in the village at the time of a shrotriem grant. The tenants under a Mirasi tenure enjoy the right of cultivating the soil by prescription and their ancestors having done so for generation, they cannot be evicted from the lands at the will of the mirasdar. As the tenants continued to occupy the lands uninterruptedly, they became the legal proprietors and according to the practice of the country, they became the owners by length of occupancy, and retained possession of the land and enjoyed its produce It is no doubt true that the tenants did not demand

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* W P Nos · 1920 to 1924 of 1964 20th April, 1967

patta nor exchanged patta with the temple authorities But merely obtaining patta in the sole name of the Devasthanam would not, by itself, determine the character of the tenure

In view of the complexity of the Mirasi rights, in view of the doubtful rights of the Mirasdar and the tenants, in view of the liberalised legislation conferring benefits on the occupants of the soil, and in view of the continuous and uninterrupted possession by the tenants of the land, the Mirasi tenure has to be interpreted according to the present state of affairs and according to the present day needs of the society In view of this it must be held that the tenants of the Baburayampettai village had the occupancy rights in the village lands The Government should therefore recognise the kudiwaram rights of the tenants in the village and collect the land revenue from them and also grant mohini allowance to the Devasthanam

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavits filed in each petitions, the High Court will be pleased to issue writs of *certiorari* calling for the records in E A. T A S Nos 3 of 1961 and 4 of 1961 on the file of the Estates Abolition Tribunal, Chingleput and quash the order dated the 31st day of August, 1964 and made therein

M S Venkatarama Ayyar, for *V. Krishnan* and *P Veeraraghavan*, for Petitioner, in each of the petitions.

Assistant Government Pleader on behalf of the 2nd Respondent, in each of the petitions, and *V. Vedantachari* and *T Rangaswami Ayyangar*, for 3rd Respondent in each of the petitions.

The Court made the following

ORDER —Some of the ryots of Baburayampettai village in Maduranthakam Taluk, Chingleput District, have filed these petitions to quash the order dated 31st August, 1964, of the Estates Abolition Tribunal (District Judge) Chingleput, declaring that the lands, for which the respondent-Devasthanam has claimed patta, are the private lands of the Devasthanam

Ever since the village of Baburayampettai was declared an Inam Estate under Madras Act XXVI of 1948, there has been regular litigation between the ryots of the Village and the Devasthanam The Devasthanam has been contending that it possessed the Melwaram and the Kudiwaram rights in the lands and that the village was not an Inam Estate In 1950, the Inam Settlement Officer, Chittoor, declared Baburayampettai as an Inam Estate The said order was confirmed in appeal by the Estates Abolition Tribunal, Madurai, holding that there was no proof that the grant was of both the warams in the village or that the grantee possessed Kudiwaram rights of its own at the time of the grant.

The respondent-Devasthanam started a second set of proceedings with an application under section 15 of the Abolition Act for the grant of ryotwari patta claiming the lands as the private lands of the Devasthanam In that petition, the tenants including the petitioners raised an objection that they had occupancy rights in the lands and that they had been in occupation of the lands from generation to generation with proprietary rights The temple authorities, on the other hand, asserted that they were receiving rent from the tenants, that the revenue records would show that the temple was the pattadar, and that the ryots had executed muchilikas to the Devasthanam as Ekabogam mirasdar. The Assistant Settlement Officer granted patta to the Devasthanam holding that the lands were the private lands of the temple The tenants filed an appeal to the Estate Abolition Tribunal, Vellore The Tribunal was of the view that the Assistant Settlement Officer had not stated how he considered the lands to be private lands, *i.e.*, whether the lands were private lands such as Khambattam, Khas etc.

as defined in section 3 (10) (*b*) (i) of the Estates Land Act or whether they fell under the other types referred to in the section On that view, the Tribunal remanded the matter to the file of the Assistant Settlement Officer to examine, the question afresh in the light of documentary evidence.

When the matter went back to the Assistant Settlement Officer, Chingleput, he went through the evidence adduced before him He found that the total extent of the village was about 600 acres and 450 acres were cultivated, that the temple never cultivated the lands, that the ryots cultivated the lands, that the Devasthanam had no kudi right, that the ryots constructed about 60 wells and that the Devasthanam never put up any well He also found that the Devasthanam never paid any money after the estate was taken over by Government and that the evidence showed that the collection was made only from the ryots In the end, he dismissed the claim of the Devasthanam for grant of ryotwari patta. The Devasthanam preferred an appeal to the Estates Abolition Tribunal, Chingleput. The Tribunal once again remitted the matter to the file of the Assistant Settlement Officer to study the history and nature of the lands in the village and then to decide whether patta should be granted to the temple on proof of possession and cultivation or whether compensation should be paid for the items of lands taken over by the State

The matter thus came back to the file of the Assistant Settlement Officer, for a third time The Assistant Settlement Officer traced the history of the village, origin of the tenure and classified the lands into four schedules He then granted patta to the Devasthanam in respect of the lands in the *D* Schedule, and disallowed the claim of the temple in regard to the lands in *A*, *B* and *C* Schedules. The persistent Devasthanam filed an appeal to the Estates Abolition Tribunal, Chingleput, and equally the tenacious tenants also filed a counter-appeal questioning the grant of patta to the Devasthanam in respect of the lands in the *D* Schedule The Tribunal noticed that from the earliest times the lands had been treated as the private lands of the Devasthanam, that the temple had been shown as the sole pattadar, that some lands had been let out on waram basis and dry lands on cash-rent basis, that there was only one patta for all the lands in the village which stood in the name of the temple and that the rent reduction notification was to the effect that there were no ryoti lands in the village The Tribunal also observed that the Paimash Register showed that the Devasthanam was the Ekaboga Mirasdar, that the tenants did not possess any occupancy rights as shown by their conduct and admission and that the temple was therefore entitled to succeed The Devasthanam was granted patta for all the lands claimed by it

These petitions are filed by the tenants to quash the order of the Tribunal

The character of the tenure is shrouded in mystery It is, therefore, necessary to trace the history of the village lands, the character of the tenure and the source of the respective rights of the Devasthanam and the tenants to the lands in detail. There is in the records a report dated 23rd January, 1834, filed by a trustee of Baburayampettai Devasthanam, in response to an order of the then Collector of Chingleput directing him to show how he became entitled to the office of trustee of the aforesaid Devastharam In that report, the history of the village is graphically described About 300 years ago, one Krishnaji Pandit came from the northern country to the Arcot Suba, gained the favour of the then Nawab of that place and got himself appointed as his Dewan. A son was born to him He was named Babu Rao He was a precocious child It is said in that report that God appeared before the child in a dream and told him that a temple should be built One day, as he was going along a thick forest where wild animals live, he had a good omen, and he understood that the temple should be built in that very place. He took steps immediately to rehabilitate the place He brought a number of people, cleared the forest, formed streets and constructed the temple in the middle. He got the idols of the *Mulavar* and *Utsavar*

cast separately for Siva and Vishnu, and named the place *Dakshina Chinna Kanchi* He received much assistance from the then Nawab and got the village assigned as rent-fee Shrotriem for the deity of Sri Vijayavaradarajaswami. Subsequently, the temple went into a bad state of affairs on account of the invasion by Mohammadan rulers Thereafter, with the help of the income from the Shrotriem and supplemented by the money of the then trustee, the affairs of the temple were conducted. According to the report, the East India Company also recognised the management of the temple by the members of Krishnaji Pandit's family

In the Inam Extract, these lands are decribed as Devadayam for the support of Sri Vijayavaradarajaswami, and Jodi or Shrotriem kist is mentioned as Rs. 136-8-0 The original grantee is described as Sri Vijayavaradarajaswami. The grant is stated to be permanent so long as the Pagoda is maintained

It is clear from the above account given in the report that the place was originally a thick forest infested with wild animals At the instance of the original founder, the villagers cleared the forest, settled in the village and brought the lands under cultivation It is true that the original founder of the temple was mainly responsible or instrumental for bringing all the lands under cultivation The ryots of the village executed **muchilikas** in favour of the temple Devasthanam agreeing to deliver **melwaram** grain rent The cultivation muchilikas executed by the ryots describe the Devasthanam as Ekabhoga Mirasdar of Sri Vijayavaradarajaswami. After the coming into force of the Estates Land Act, the ryots began to assert that they have occupancy rights in the lands The Devasthanam was shrewd enough to take muchilikas with a term that the temple would take possession of the lands after the expiry of the lease Nonetheless, the tenants continued in possession of the lands from generation to generation, making improvements to the lands and constructing wells The lands were dealt with as if they were their own lands. There was partition of the lands between the members of the families of the ryots; mortgages were effected in times of need; gifts were made by testamentary disposition to their kith and kin, and thus the lands continued to be in their possession. Whenever there were misunderstandings and disagreements between the Devasthanam and the tenants, they resorted to litigation making a trial of their strength, the ryots asserting that they have occupancy rights and the Devasthanam asserting that the lands are the private lands of the temple In one of the earliest litigations in the year 1917, the District Munsif held that the tenants had let in no evidence which would show that the grantee had not the kudiwaram at the time of the grant (the burden of proof was then on the tenants), and that the village was not an estate to which the Estates Land Act would apply. In spite of this litigation, the tenants continued in possession of the lands asserting their rights, till the Abolition Act came into force.

When the Estate was taken over by the State under the Abolition Act, once again trouble started between the Devasthanam and the ryots, the former contending that it had both the warams and the latter contending that they had occupancy rights. Though the Devasthanam attempted to get a declaration from the revenue authorities that the village was not an Inam estate, the Devasthanam failed in its attempt. The Inam Settlement Officer declared the village of Baburayampettai to be Inam estate under Madras Act XXVI of 1948. On appeal by the Devasthanam, the Estates Abolition Tribunal of Madurai, confirming the finding of the Settlement Officer, held that there was no proof that the grant was of both the warams in the village or that the grantee (temple) possessed kudivaram rights of its own at the time of the grant

Learned Counsel for the petitioners contends that once the Tribunal gave a finding that the temple did not possess both the warams and when the temple had failed to establish that it possessed kudiwaram right at the time of the grant, it cannot be allowed to once again reopen the question namely that it has kudiwaram

rights by asserting that the lands are the private lands of the Temple. To support his proposition of law, he drew my attention to *Desika Gharyulu* v. *State of Andhra Pradesh*[1], where it was held that the determination by the Settlement Officer of the question whether the 'inam village' was an inam estate was within his exclusive jurisdiction and in regard to it the jurisdiction of the civil Courts was clearly barred. It is true that the temple authorities cannot agitate that the lands are not in the inam estate. As far as the question whether the village is an inam estate or not, it has been finally settled by a heirarchy of authorities that it is an inam estate. But for the respondent-Devasthanam it is claimed that even in an inam estate the temple can own private lands, and that is why the Devasthanam filed an application under section 15 of the Abolition Act. Section 15 of that Act says:

> "The Settlement Officer shall examine the nature and history of all lands in respect of which the landholder claims ryotwari patta under sections 12, 13 or 14, as the case may be, and decide in respect of which lands the claim should be allowed. . . ."

The landholder may possess private land in an estate within the meaning of section 3 (10) (*b*) of Estates Land Act, or stood recorded as private land in a record prepared under the provisions of Chapter XI or Chapter XII or the said Act Therefore we cannot say that the temple has no right to file an application for grant of ryotwari patta.

The question that arose before the Settlement Officer was whether the temple established that it had got private lands in the Baburayanpettai village It is, therefore, necessary to determine whether the temple has private lands in the village Sri M S Venkatarama Iyer for the petitioners contends that the Devasthanam has not satisfied the tests laid down in *Periaman* v. *A S. Amman Kovil*[2], and that the petitioners have shown that they and their predecessors have been in continuous possession of the lands in the village from generation to generation from as early as 1686. It is true that they have been executing machilikas from 1890 onwards in favour of the temple, and even after the Estates Land Act came into force. But, according to learned Counsel for the petitioners, that would not by itself determine that the petitioners have lost their occupancy rights in the lands

In regard to the burden of proof of establishing the occupancy rights, formerly there was a controversy whether it was on the tenants or on the landholder Now the matter has been set at rest by the Judicial Committee in *Lakshmanna* v *Venkateswarulu*[3], where it is observed that Courts have to find out whether the Inamdar has proprietary interest in the land from the whole circumstances relating to the holding, such as the terms of the grant when the deed is available, long possession, the course of dealing between the Inamdar and the tenant, dealings with the land by the tenant, and that the burden is on the landholder to make out a right to evict the tenant by proving that the grant included both the melvaram and the kudiwaram interests or that the tenants were let into possession by the Inamdar under a terminable lease and not on the tenants to prove their occupancy rights It is also observed that the dealings with the property by the tenants by sales or mortgages, if proved, will be indicative of the existence of kudiwaram interest in them, that from the absence of such dealings no inference can be drawn in support of the claim of the Inamdar to eject the tenants, and that in estimating the value of the stipulations and admissions made by the tenants in the written muchilikas executed by them, the Court cannot neglect the consideration that a ryot, so long as he is not evicted, might be prepared to sign anything This principle has been followed by their Lordships of the Supreme Court in *Sunkavilli Surama* v *Goli Sathiraju*[4], where it is observed that the Zamindars were accustomed to take machilikas or other

1 A I R 1964 S C 807

2 I L R (1952) Mad 741 (1952) 1 M L J 71 (F B)

3. L R 76 I A 202 · (1949) 2 M L J 500 I L R (1950) Mad 567 A I R 1949 P C 278

4 (1962) 1 An W R (S C) 149 (1962) 1 M L J (S C) 149 (1962) 1 S C J 331 A I R. 1962 S C 342

writings from their ryots admitting, notwithstanding the true nature of rights, that their tenure was restricted and that such a covenant was, by itself, not sufficient to justify the inference that the ryots tenure was precarious Therefore the mere execution of muchilikas by the tenants in the instant case would not, by itself, establish that the landholder has got both the melwaram and kudiwaram rights But what learned Counsel for the Devasthanam contends is that the tenure is in the nature of Mirasi tenure, that the grant was made to Sri Vijaya Varadarajaswami of both the melwaram and kudiwaram interests and that the tenants are only cultivators under the Mirasi tenure

The rights of the Mirasdar in the law of tenure is one of the most complex, mingled and mixed in the rights between the Mirasdar and the tenant. The meaning of Miras, as given in the Replies to Seventeen Questions proposed by the Government of Fort St George relating to Mirasi right, is that it is a general term to designate a variety of rights, differing in nature and degree, but all more or less connected with the proprietary possession, or usufruct, of the soil, or of its produce. Manyams, lands free of tax, and *mereis* cess at various rates, received in kind from the general produce and other privileges of the various communities are called *miras*. The right of the permanent cultivator to the hereditary usufruct of the land is called *miras*. So also is the right of the Sircar share of the produce of land held by special grant under the various denominations of Servamanyam, Ardhamanyam, shrotriam and so on In Chingleput and Arcot Districts, the proprietory Mirasdars hold a certain extent of land free of all assessment and are entitled to receive cess under the various denominations from the gross produce of all taxable lands, and *tunduvaram*, a portion of the produce, or Swam bogam, the landlord's right, from all land cultivated by *Payacaris*, or persons not Mirasidars. They are otherwise called fixed cultivators They may be called tenants-at-will or tenants under special agreement. The tenants hold the property not absolutely. Still they possess the power of sale of cultivable land Mirasi inhabitants have the right to cultivate the soil The administrators, collectors and revenue officers hold diametrically opposite views in regard to the rights of the tenants in the Mirasi tenure

In one of the earliest cases on the subject, *Chinnan* v *Kondam Naidu*[1], a Division Bench of this Court had to deal with the Mirasi tenure in the very same district of Chingleput, wherefrom the present case has arisen The Bench observed that a Payakari by continued residence in the village and cultivation of the same lands for three generations acquired a permanent right of occupancy In the same decision, Sadasiva Aiyar, J (One of the learned Judges constituting the Division Bench) observed·

> "It seems to me now that a person cannot be held to own the Kudiwaram right in its true and complete sense unless he has also got the power of alienation of his right of occupancy and unless he does not acknowledge himself to be merely the tenant of a person really owning the Kudivaram right."

In the present case, several instances have been brought to my notice when these fixed cultivators have dealt with the lands independently in their own right by way, of mortgage, gift and sale

Learned Counsel for the petitioners further contends that the Inam title deed shows the nature of the grant in the village is Devadayam and the grant is to be permanent so long as the Pagoda is maintained The word 'shrotriam' would indicate that the revenue from the land would go to maintain the temple But it would mean that there should be a grant of the land itself To support his proposition, he cited *Seethayya* v *Subramania Somayajulu*[2], where Privy Council has observed thus

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1 (1913) 26 M L J 169 at 175 2. (1929) I L.R 52 Mad 453 56 M L J 730 at 737.

"Shrotriam, according to Wilson's Glossary, means a grant of lands or a village held at favourable rate, formerly as assignment of land or revenue to a Brahmin learned in the Vedas, but latterly applied to similar assignments to native servants of Government Civil or Military, and both Hindus and Muhamadans, as a reward for past services A Shrotriam grant gives no right over the lands and the grantee cannot interfere with the occupants as long as they pay the established rents"

It was held in that case that the grant in quest on was a grant of the melwaram only. It was also held on the terms of the grant that it could only mean revenue. In the present case, as I said, the purpose of the grant is stated to Devadayam, and Jodi or Shrotriam kist is given as Rs 136-8-0 This gives me the impression that the grant consists of melwaram only If we take the circumstances under which the Inam was granted, it is very clear that the original founder brought these villagers or tenants to clear the forest, reclaim the land and to settle down there and cultivate the lands These persons have been in continuous possession of the lands, though the founder of the temple got the village assigned in favour of Sri Vijaya Varadaraja Swami. These tenants were the first tillers of the soil in the village. It is true that the founder of the temple was instrumental in bringing these tenants for the purpose of tilling the soil either before or after constructing the temple and was also instrumental in getting the lands assigned in the name of the temple. But it does not mean that the temple has got both the melwaram and kud waram. Further the lands are situate in Chingleput district and the tenure is what is called the Mirasi tenure which is always a complicated and contested one. It has given rise to doubtful rights in the Mirasdar and the tenants as well There is one factor, however, which has to be borne in mind that these tenants continued to live in the village from generation to generation, cultivating the soil and dealing with the lands in their own right At no time was this objected to by the Devasthanam. At no time did the temple authorities interfere with the ryots' mode of cultivation. The Devasthanam was only concerned with executing muchilikas, getting favourable rent But they never took effective steps to establish their kudiwaram right in the lands No doubt the Devasthanam filed suits against the tenants, but they were for recovery of arrears of rent and for eviction It was more or less a trial of their strength On those occasions, on the law as it stood then, the burden of proof was on the tenants to show that they had kudiwaram interest. But now the law has changed, and it is the duty of the landholdder to establish that he has both the melwaram and kud waram rights It cannot, therefore, be said that merely because the respondent-Devasthanam has been described as Ekabogham Mirasdar in some of the Muchilikas, it possesses kudiwaram interest also. A mere recital in a document that a person was a Ekabogam mirasdar would not necessarily show that he was the owner of the entire kud waram in the village at the time of a shrotriam grant The tenants under a Mirasi tenure enjoy the right of cultivating the soil by prescription, and their ancestors having done so for generations, they cannot he evicted from the lands at the will of the Mirasdar. They cannot be compelled to relinquish their lands at the command of the Mirasdar. They may have no right in the substance of the soil, but they have a right to use the soil and to cultivate it They are only liable to pay a share of the produce from and out of the land in their possession The tenants under a Mirasi tenure are very near in situation to tenants of an Estate, who are given the preference of cultivation The tenants who were brought in to clear the jungle land also settled down permanently, and the tenants continued to live where their fathers and forefathers lived and died before them, by succeeding to their rights and privileges which constituted their estate of which they could not be deprived As the tenants continued to occupy the lands uninterruptedly, they became the legal proprietors, and according to the practice of the country, they became the owners by length of occupancy, and retained possession of the land and enjoyed its produce It would be necessary here to repeat that the founder of the temple was neither an agriculturist nor a cultivator He only spotted the spot by divine intuition and built

a temple clearing the forest. Because the temple was put up there, he colonised the place. The people who came to clear the forest reclaimed the land and settled down there and began to cultivate it. It is true that the founder got the lands assigned to the temple as Devadayam grant, and asked the tenants to pay shrotriam fees The temple was being managed from the income from the lands But it is not clear whether the Devasthanam, at the time of the grant, possessed any kudiwaram interest. The villagers were already inducted into the lands, at the time that grant was made They have been in possession of the soil and actually cultivating it They are the persons who must have the kudiwaram rights in the lands The basis of the mirasi tenure is stated to be that cultivated land is the property of the man who cuts away the wood or the first who cleared and tilled it (See *Varadappan* v. *State of Madras*[1] Even the founder of the temple was only obsessed with the idea of building a temple and wanted to make permanent arrangements for maintaining it It was only with that view he got the lands assigned to the temple. It is no doubt true that the tenants did not demand patta nor exchanged patta with the temple authorities. According to learned Counsel for the Devasthanam the temple was the sole pattadar. But merely obtaining patta in the sole name of the Devasthanam would not, by itself, determine the character of the tenure. The system of Mirasi tenure in Chingleput District is an obscure, obsolete and archaic one. In view of the complexity of the Mirasi rights, in view of the doubtful rights of the Mirasdar and the tenants, in view of the liberalised legislation conferring benefits on the occupants of the soil, and in view of the continuous and uninterrupted possession by the tenants of the land, I am of the opinion that the Mirasi tenure has to be interpreted according to the present state of affairs and according to the present day needs of the Society. In view of the above considerations, I think that the tenants do have occupancy rights in the land I am, therefore, of the further opinion that the Government should recognise the kudiwaram rights of the tenants in the village and collect the land revenue from them and also grant *mohini* allowance to the Devasthanam The reason why the tenants did not rush to revenue authorities to obtain patta might probably be due to the fact that they were asserting their occupancy rights in the proceedings initiated by the Devasthanam for grant of ryotwari patta, which purposeless and wasteful litigation lasted for nearly two decades. It is high time that Government should interfere, so as to set at rest the respective rights of the Devasthanam and the tenants in Baburayampettai village

For the aforesaid reasons, the writ petitions are allowed but with no costs.

V.K. ——— *Petitions allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE M. NATESAN

The State of Madras by the Collector of Thanjavur *Petitioner**

v.

Ramanatha Rao and another .. *Respondents*

Court-fees Act (VII of 1870), *section* 11—*Application for the ascertainment of future mesne profits under Order* 20, *rule* 12, *Civil Procedure Code, and final decree thereon—Final decree with the direction for payment of Court-fee within time specified—Dismissal of the petition for non-compliance—Final decree on later applications with the direction for payment of Court-fee before executing the decree—Prior order dismissing the application for final decree, if has become final*

Civil Procedure Code (V of 1908), *section* 115—*Powers of the High Court under—Substantial justice done by the Court below—Interference—If warranted.*

The plaintiff (first respondent) applied in the trial Court for ascertainment of future mesne profits from the date of the suit till delivery of possession under

1 (1963) 1 M L J 405 at 409

* C.R P. Nos 566 and 1290 of 1966 27th April, 1967

Order 20, rule 12, Civil Procedure Code, and for a final decree for the profits as ascertained. The Sub-Court gave the plaintiff a final decree in the sum claimed by him. But the Court directed that the Court-fee should be paid in two weeks Despite the contention on behalf of the plaintiff, that he cannot be called upon to pay Court-fee at that stage and he may pay the Court-fee when seeking to execute the decree, the Court dismissed the petition for non-compliance with the direction as to payment of Court-fee Later, he came out with two applications praying once again for a final decree for the amount of mesne profits ascertained offering to pay the Court-fee due and in the alternative he prayed for extension of the time originally fixed for payment of Court-fee after excusing the delay in paying the same On these applications, the Subordinate Judge directed th plaintiff to pay the necessary Court-fee on the amount decreed before executing the decree

Is this order sustainable under section 11 of the old Court-fees Act?

Held that, no jurisdiction is given to the Court under section 11 of the old Court-fees Act to call for Court-fee on future mesne profits before passing of the final decree, nor is it empowered to dismiss an application for ascertainment of future mesne profits and for a decree thereon for non-payment of Court-fee within the time fixed The point in Order 20, rule 12, clause (3) which applies in this case does not even require an application for the purpose The original order providing time for payment of Court-fee was an unnecessary direction and incorrect condition that cannot be and should not be given effect to. The order of dismissal for non-payment of Court-fee was merely a statistical closure and there has been no final refusal of any substantial relief to the plaintiff on the earlier occasion to preclude him from claiming a final decree now

If need be, the applications could be dealt with as one for review of the earlier order and on review further proceeded with. No question of bar of *res judicata* or any analogous principle can arise in this case

The powers of this Court under section 115, Civil Procedure Code, are intended to subserve and not to defeat the ends of justice. When substantial justice has been done by the Court below, this Court will not interfere in revision notwithstanding that the reasons given by the Court below for the impugned order are not correct. Interference would be warranted only if injustice or hardship would result from failure to interfere.

Petitions under section 115 of Act V of 1908 praying the High Court to revise the order of the Sub-Court, Mayuram, in I A Nos 213 and 214 of 1964 in O S. No 47 of 1949

The Additional Government Pleader, for Petitioner

T S Kuppuswamy, for Respondents

The Court delivered the following

JUDGMENT:—These revisions ought not to have been preferred by the State. Clearly the liability of the State is undisputed and without further demand the moneys could properly have been brought into Court for payment out to the petitioner. The State wants to defeat the claim on wholly unsubstantial and technical grounds that do not in the least touch the merits of the case The lower Court has done the best to avoid manifest injustice, and got round a patently erroneous earlier order wholly devoid of jurisdiction But the State has chosen to challenge the correctness of the lower Court's action So, I shall deal with the case on its merits

Ramanatha Rao, the first respondent herein, the plaintiff in the suit, out of which these proceedings arise, filed a suit for recovery of possession of the suit properties and for mesne profits from the date of the institution of the suit The Government had started escheat proceedings against the properties, which had

been left by one Jagannathan and proceeded in the view that he left no heirs Ramanatha Rao instituted the suit contending that himself and his brother, the second respondent in these proceedings, were heirs of the said Jagannadhan entitled to the properties. The plaintiff succeeded in this Court in A S. No 523 of 1951 having lost in the trial Court A decree for possession was given with future profits from the date of suit. The State's Letters Patent Appeal No 26 of 1956 was dismissed on 18th December, 1959. The plaintiff had meanwhile pursuant to, the decree of this Court on appeal taken possession of the properties on 18th April, 1956 After the disposal of the Letters Patent Appeal, by I A. No. 115 of 1962, the plaintiff applied in the trial Court for ascertainment of future mesne profits from the date of the suit till delivery of possession under Order 20, rule 12, Civil Procedure Code. and for a final decree for the profits as ascertained. The income derived by the Government had been deposited by the State in the Treasury and there was no dispute as to the correctness of the amount deposited by the State as the income from the properties In a partition between the plaintiff and his brother, the second respondent herein the plaintiff became entitled to the sum of Rs. 12,463-45, as and for his share of the profits and in the circumstances in the proceedings under Order 20, rule 12, Civil Procedure Code, on 10th September, 1962, the Sub-Court, Mayuram, gave the plaintiff a final decree in the sum of Rs. 12,463-45 But while passing the decree, the Court added—

> "The first respondent is granted two months' time to pay this amount The petitioner will pay the Court-fee in two weeks Call on 25th September, 1962"

The petition was adjourned to 1st October, 1962 for payment of Court-fee subsequently On that date, despite the contention on behalf of the plaintiff, that he cannot be called upon to pay Court-fee at that stage and that he may pay the Court-fee when seeking to execute the decree, the Court dismissed the petition for non-compliance with the direction as to payment of Court-fee. The validity of the order was not questioned then and later the petitioner came out with the two applications I A No. 213 of 1964 and I A No 214 of 1964, the orders on which have given rise to these revision petitions In these applications the plaintiff prayed once again for a final decree for the amount of mesne profits ascertained offering to pay the Court-fee due and in the alternative he prayed for extension of the time originally fixed for payment of the Court-fee after excusing the delay in paying the same On these applications it was contended for the State that the prior order in I.A No. 115 of 1962 dismissing the application had become final and the Court had no further jurisdiction in the matter to extend the time and grant a further final decree.

The learned Subordinate Judge examined the provisions of the Code and the old Court-fees Act and having regard to the decisions placed before him granted a final decree for the amount claimed against the State, directing the plaintiff to pay the necessary Court-fee on the amount decreed before executing the decree The learned Subordinate Judge took the view that in view of the dismissal of I.A No 115 of 1962, no final decree has been passed and that in the absence of a final executable decree as directed by the preliminary decree, the Court could now pass an executable final decree He was of the view that even assuming that the order in I A No 115 of 1962 was conclusive and had become final, the present applications could be treated as applications for review and for continuation of I A No. 115 of 1962

There can be no doubt that the Court in the first instance in I A. No 115 of 1962 had no jurisdiction to dismiss the application for non-payment of Court-fee The application was for determination of future mesne profits accrued pending suit under Order 20, rule 12, Civil Procedure Code This Court on appeal had directed the ascertainment of the future profits and passing a final decree on such ascertainment No Court-fees can be demanded on such an application at the initial stage or before the drafting of the decree Section 11 of the old Court-fees Act which governs the recovery of Court-fees in respect of mesne profits ran thus :

"In suits for mesne profits or for immoveable property and mesne profits or for an account if the profits of amount decreed are or is in excess of the profits claimed or the amount at which the plaintiff valued the relief sought, the decree shall not be executed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits or amount so decreed shall have been paid to the proper officer Where a decree directs an enquiry as to mesne profits which have accrued on the property during a period prior to the institution of the suit, if the profits ascertained on such enquiry exceed the profits claimed, no final decree shall be passed till the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid If the additional fee is not paid within such time as the Court shall fix, the claim for the excess shall be dismissed, unless the Court, for sufficient cause, extends the time for payment. Where a decree directs an enquiry as to mesne profits from the institution of the suit, and a final decree is passed in accordance with the result of such enquiry, the decree shall not be executed until such fee is paid as would have been payable on the amount claimed in execution if a separate suit had been instituted therefor "

In this provision for realisation of Court-fee on mesne profits paragraphs 1 and 3 alone relate to profits accrued after the suit In relation to future profits, the embargo is against the execution of the decree until the Court-fee due on the future profits as ascertained is paid. It is only in cases, where an enquiry has been directed into past mesne profits, that is profits accrued prior to the institution of the suit, we find provision for demanding Court-fee before the passing of the final decree In such cases, no final decree shall be passed till the difference between the fee actually paid for past profits and the fee which would have been payable had the suit comprised the whole of the profits ascertained is paid In such cases, the Court shall fix a time for payment of the additional Court-fee. If the additional Court-fee is not paid, the claim should be dismissed, unless the Court for sufficient cause, extends the time for payment No jurisdiction is given to the Court to call for Court-fee on future mesne profits before passing of the final decree, nor is it empowered to dismiss an application for ascertainment of future mesne profits and for a decree thereon for non-payment of Court-fee within the time fixed The point in Order 20, rule 12, clause (3) which applies in this case does not even require an application for the purpose

In *Kunjammal* v. *Krishna Chettiar*[1], with reference to the claim for profits, the decree provided that the Court-fee should be paid within a week from the date of the decree. It was a decree falling under section 11, para 1 of the Court-fees Act regarding a claim for past and future profits The Division Bench of this Court observed :

" . . . .under this paragraph (section 11, para 1) the only penalty for non-payment of Court-fee is that the decree could not be executed until they are paid It will be noticed that this paragraph does not contemplate the Court fixing any time within which the Court-fee has to be paid There is no need for it inasmuch as the plaintiff could not execute the decree unless he paid the Court-fees. In this case, the decree in providing that the Court-fee should be paid within one week, went in our opinion beyond what is permitted under section 11, para 1".

This Court observed that the clause in the decree requiring the plaintiff to pay Court-fee within a week of the decree cannot be construed as involving a decision that the suit should stand dismissed if the Courtf-fee was not paid.

The earlier decision of this Court in *Perianna Chetti* v. *Nagappa Mudali*[2], was referred to. In that decision with reference to future profits ascertained a date was fixed by the decree for payment of the Court-fee and the Court-fee was not paid within the time provided In such circumstances this Court said :

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1 (1953) 2 M L J 185, 188 32, 34
2 (1906) 16 M L J 543 I L R 30 Mad

"The real question is whether the direction regarding payment of Court-fee set forth in the concluding part of the decree forms any part of the decree so as to necessitate the amendment of the decree before the time limited can be extended. We are of opinion that the words in question do not form any part of the decree and that no amendment of the decree is necessary to enable the Court to extend the time."

In *Vishoo Ditti* v. *Ramashri*[1], the Judicaial Committee observed :

"The words 'if the additional fee is not paid... ....the suit shall be dismissed' can apply only to cases falling within the second paragraph of section 11. Therefore, the lower Court had no jurisdiction to make the order dismissing the plaintiff's suit (if it falls under paragraph 1, of section 3)"

As pointed out in In re *Kantheswaram Ekanathalingaswami Koil through its Trustee Venaniyagam*[2], the point to note with reference to section 11 of the Court-fees Act is and it is, an important point, that in respect of future mesne profits no portion of the Court-fee is payable before the final decree is passed, and even then, if the plaintiff does not seek to execute the decree, which he has invited the Court to pass in his favour, he may altogether escape the payment of the Court-fee. If despite the final decree, the decree should be satisfied out of Court without the need for execution no Court-fee can be levied : the parties may avoid paying the Court-fee.

It is rather surprising that when the law is so clear and well-established, a Court should have on 5th October, 1962 dismissed an application for passing of a final decree for profits *pendente lite* when the profits had been ascertained and the quantum was beyond dispute, on the simple ground that Curt-fee as directed by the Court had not been paid within the time fixed. This order was passed notwithstanding the contentions on behalf of the plaintiff that no Court-fee need be paid under the old Act and that he need pay Court-fee only at the time of the execution.. It is this order of dismissal that is wholly erroneous and clearly beyond jurisdiction that is sought to be maintained by the State while not otherwise disputing the liability for mesne profits. It passed my comprehensive how the State could appropriate itself this money it had deposited in Treasury as representing the income from property to which it was found not entitled A third party would have in such circumstances, passed on money to the decree-holder and settled the matter without payment of Court-fees I cannot understand a Court dismissing the petition straightaway for non-payment of Court-fee if the effect of the order would be to deprive the party of what had been decreed No law required the Court to so act in a case of this kind.

The order of the lower Court in this case could be maintained on one of several grounds The original order providing time for payment of Court-fee was an unnecessary direction and incorrect conditions that cannot be and should not be given effect to. The condition in the original order was a surplusage, which if enforced with penal consquences would nullify the rights recognised in a manner wholly unwarranted by law. But that is what is stated to have happened in this case. The question is, should I construe now the order passed by the learned Subordinate Judge dismissing the application as a final rejection of the plaintiffs' claim for profits though unwarranted in law, or should I interpret it in harmony with law

The mesne profits had been deposited in the Treasury. There was no dispute about it At any time the money could be transferred by the State to the Court to the credit of the suit in execution The Court had granted time for payment of the amount It may be that the learned Subordinate Judge expected that the petitioner would apply in execution for payment out and directed the realisation of the Court-fee. It was an irregular order and could have been ignored As pointed out in the case above cited, non-compliance with the direction cannot necessarily

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1. (1937) L.R. 64 I A 191 (1937) 2 M L J 1 (P C)
2. I L R (1937) Mad 284 71 M L J 677.

lead to the dismissal of the application. Why should I assume that the learned Subordinate Judge was unaware of the law, when I can interpret the order of dismissal as merely an order adjourning the matter *sine die* or a closure of the application for the time being. Such orders have been common in execution proceedings. Execution applications, when really closed for statistical purposes were often termed as dismissed Such orders have been construed as orders adjourning the petition *sine die*. In *Timmaraju* v *Narasimharaju*[1], where an application under Order 20, rule 12, was stated as dismissed by the Court on default of payment of additional batta, Jackson, J., interpreted the order of dismissal of the application as not such dismissal as would render that application inoperative and that plaintiff was entitled to proceed upon the original application This case was no doubt dissented from in the decision of the Full Bench in *Ramasubramania Pattar* v. *Karimbil Pati*[2], but on a different aspect of the questions raised. Why should one readily assume that the Court intended to deprive the plaintiff of the mesne profits which had been ascertained and about the realisation of which there could be the least difficulty. The proper inference, in the circumstances, would be that the Court, in view of the failure or inability of the plaintiff in not bringing the Court-fee as directed closed the proceedings for the time being, that is adjourned it *sine die* to be revived, when the plaintiff could secure the necessary Court-fee. As stated earlier the order was not called for then. But I cannot say that the learned Subordinate Judge intended to pass a final order debarring the plaintiff thereafter from claiming the mesne profits, which had rightfully been found to be due to him. The summary manner in which the matter had been treated even after the attention of the Court had been drawn to the fact that no Court-fee could be demanded at this stage, inclines me to the view that the learned Subordinate Judge was not dismissing the application in the sense of finally ending the matter once and for all In terms of the direction on the appeal, the preliminary decree having directed the ascertainment of the mesne profits, the Court was bound to ascertain the mesne profits and pass a final decree. Its hands were tied in this regard and it cannot refuse to pass a final decree. No final decree had yet been passd and a final dismissal of the proceedings under Order 20, rule 12, Civil Procedure Code, would go against the preliminary decree. In these circumstances, rightly, it can be said that the order of dismissal for non-payment of Court-fee was merely a statistical closure and that the original application wherein the mesne profits had already been ascertained, was pending in the Court when the plaintiff filed the present applications in question, out of which, these revisions arise. There has been no final refusal of any substantial relief to the plaintiff on the earlier occasion to preclude him from claiming a final decree now.

Even if the original order was the final order, there is nothing in law to preclude a subsequent application for passing a final decree Reference in this connection may be made to the decision of the Full Bench in *Ramasubramania Pattar* v. *Karimbil Pati*[2], already referred to, where with reference to the sub-rule of Order 20, rule 12 as it stood before its amendment, it was said that the application of the decreeholder for ascertainment of mesne profits when the appellate Court directs such an enquiry, is not an application falling under Article 181 of the Limitation Act. Order 20, rule 12, sub-rule (3) as it now stands reads thus :

> "Where an appellate Court directs such an enquiry, it may direct the Court of first instance to make the enquiry, and in every case the Court of first instance may of its own accord, and shall whenever moved to do so by the decreeholder, inquire and pass the final decree "

In the present case, it is the appellate Court that granted the decree for possession and directed an enquiry into profits *pendente lite* and for a final decree in regard to the same. In such a case, the Court is bound to move on its own accord or when moved by the decreeholder As pointed out above, there is yet no final decree in

1 (1928) 54 M L J 665
2 I L R (1940) Mad 372 (1940) 1 M L J 54

the matter There is no provision of law precluding the Court from reconsidering the matter and passing a final decree for the mesne profits found accrued. Order 20, rule 12 (3) does not contemplate any application for the purpose. The Code casts the duty on the Court of first instance either of its own accord or whenever moved to do so by the decree-holder to enquire and pass the final decree No question of bar of *res judicata* or any analogous principle can arise in this case There was no disposal of the matter on the merits Viewed thus also, the applications made have been properly entertained by the lower Court In this view it is unnecessary to consider whether a decree or order made by a Court without jurisdiction could in the very proceedings at later stages be ignored and treated as nullity or *non est* when it is not a case of inherent want of jurisdiction Neither Counsel placed any direct authority before me on the question.

As noticed by the trial Court now, if need be the applications could be dealt with as one for review of the earlier order and on review further proceeded with If it were necessary this Court could under section 115, Civil Procedure Code, *suo motu* revise the earlier order of dismissal and regularise the present proceedings

The present revisions can be disposed of on a less complicated ground also The powers of this Court under section 115, Civil Procedure Code, are intended to subserve and not to defeat the ends of justice When substantially justice has been done by the Court below, this Court will not interfere in revision notwithstanding that the reasons given by the Court below for the impugned order are not correct The liability of the Government has been established and is not disputed The defence taken is purely technical. In the circumstances, if the discretionary power under section 115, Civil Procedure Code, is not exercised it will be only for perpetuating an injustice and approving an illegality It is not in every case that this Court should interfere in revision on the ground that an order has been made in an irregular or erroneous exercise of jurisdiction Interference would be warranted, only if injustice or hardship would result from failure to interfere In *Kelu Kurup* v *Subramania Aiyar*[1], before Beasley, C J , the question arose whether the High Court is not bound to interfere in a revision when the trial Court had no jurisdiction to try the suit, that is where the District Munsif had wrongly tried an original suit on the Small Cause side or conversely had tried a small cause suit on the original side. The learned Judge observed that he was satisfied from the cases which have been put before him that the majority opinion in this Court was that the High Court was not bound to allow the point under such circumstances to be taken or if it is allowed to be taken, the High Court is not bound to interfere in revision if it is satisfied that the lower Court's decree was correct. Adopting this principle, on the short ground that this Court is not bound to interfere in every case under section 115, Civil Procedure Code, for the reason only that the impugned order is not warranted by the law and that there is jurisdictional defect in the making of it, these revision petitions could be disposed of.

In the result, the revision petitions fail and are dismissed with costs of the first respondent in each case.

V.M K. *Revision Petitions dismissed.*

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1 (1937) 2 M L J 299 A I R 1937 Mad 644

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE P. RAMAKRISHNAN.

V.E R.S. Ramaswamy Chettiar .. *Petitioner**

v.

Assistant Engineer, Highways, Musiri, Tiruchirapalli District and others . *Respondents.*

Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), sections 18 (4), 18 (6) and 21—Petitioner claiming the disputed land as constituting frontage to his house and not as part of the street poromboke—Appellate survey officer upholding his claim, but refusing to alter the boundary accordingly—What remedy, if any, available to the petitioner under the Act

Both the adjacent highways road poromboke and the petitioner's land formed part of an estate village which was taken over by the Government by the application of the Estates Abolition Act XXVI of 1948. The appellate survey officer has also given a categorical finding in his decision that the land is a frontage to the house of the petitioner who contended that the disputed land was an appurtenant to his building, and that it could never form part of the adjacent street poromboke as per state of things on ground. In such circumstances there will arise a question for decision under section 18 (6) of the Madras Estates Abolition Act. Under section 18 (4), every building other than a building referred to in sub-sections (1), (2) and (3) shall with effect from the notified date vest in the person who owned it immediately before that date.

Section 18 (6) *inter alia* provided that if any question arises whether any building or land falls or does not fall within the scope of sub-sections (1), (2), (3), (4) or (5) it shall be referred to the Government whose decision shall be final and not liable to be questioned in any Court of law. Under the subsequent rules, the power to decide this question has been delegated by the Government to the Board of Revenue. In the above circumstances, if the facts are established as claimed by the petitioner that the disputed land is an essential part of his building constituting its frontage and could never form part of the street poromboke, he will be entitled under section 18 (6) of the Estates Abolition Act which he could obtain by an application to the Board of Revenue

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in L C A F B 16/Musiri of Appellate Survey Officer and Officer in charge No II Survey Party, Salem, the third respondent and quash the order dated 20th April, 1964, made by him in the said appeal confirming the inclusion of the site measuring 7 feet 8 inches by 15 feet 9 inches of the petitioner's land in S No. 359/791 as part of S No 384

M. S. Venkatarama Iyer, for Petitioner.

J. Kanakaraj, for the Government Pleader, for Respondents

The Court made the following

ORDER.—The petitioner claims to be the owner of S No. 357/791 in Thuraiyur village, adjoining the bazaar road which bears S. No. 384. The predecessor-in-title of the petitioner purchased the property in Court auction and also obtained a sale certificate on 9th June, 1933 in execution of a decree on a mortgage. The petitioner got the property in a subsequent partition and has been enjoying the property ever since. When he wanted to put up a building on the site, a dispute was raised as to whether the site was included in the road poramboke in S. No 384. Thereupon, the petitioner, according to his affidavit, made an application to the Survey Officer, Musiri, under section 10 (1) of the Madras Survey

* W P No 1968 of 1964 28th July, 1967

and Boundaries Act, 1923 complaining that the abovementioned property, which was really part of his land, had been erroneously included in 1927 in the survey conducted in that year, without notice to him and that the said survey was wholly wrong because it included the petitioner's private property within the boundaries of the road poramboke. The Survey Officer took evidence but refused to alter the boundary and confirmed the present demarcation Thereafter, the petitioner preferred an appeal to the Appellate Survey Officer, Salem, under section 11 (1) of the Survey and Boundaries Act. The said officer heard the appeal and on a perusal of the petitioner's documents came to the conclusion that what was really a part of the petitioner's land had been included in the road poramboke in the survey held in the year 1927 and that at the time of survey it was doubtful if the statutory notice under section 9 (2) of the Survey and Boundaries Act had been given to the petitioner, because on a reference made to the Assistant Director of Survey, it was ascertained that the records relating to the service of the above notice was not available for production. The petitioner contends that since he has succeeded in the above manner in respect of his principal contention before the Appellate Survey Officer the latter officer should have thereafter passed appropriate orders for altering the boundary in such a manner that the portion erroneously included in the road poramboke in the 1927 survey should be excluded and included in survey number allotted to the petitioner's property The affidavit of the petitioner went on to allege that subsequently the village where in the disputed S. Nos. are situate, and which formed part of an estate, was taken over by the Government under the Estates (Abolition and Conversion into Ryotwari) Act, 1948 (XXVI of 1948) and for the purpose of effecting a ryotwari settlement under that Act, a re-survey had been conducted under section 21 of the Estates Abolition Act, that at that re-survey, the earlier demarcation of S. No 384 as highways road poramboke was confirmed. The petitioner contends that this is illegal and should be set aside. It was urged that the re-survey under section 21 of the Estates Abolition Act is not a general survey under the Survey and Boundaries Act but is limited to the introduction of the ryotwari settlement

In the counter-affidavit filed by the Deputy Director of Survey and Land Records on behalf of the respondents in this writ petition, it is alleged that the re-survey under section 21 of the Madras Act XXVI of 1948 had been effected in accordance with the provisions of the Survey and Boundaries Act, 1923, that a decision had been given in that survey that the disputed land formed part of the road poramboke, and that the Survey authorities who had been asked to dispose of the dispute about the boundary could not ignore that decision given at the time of the resurvey under section 21 of the Estates Abolition Act The petitioner, if he is aggrieved with the decision of the re-survey, can seek his remedies by way of a civil suit after the publication of a final notification under section 13 of the Survey and Boundaries Act, 1923

Learned Counsel appearing for the petitioner has referred me to the orders of the Appellate Survey Officer dated 20th April, 1964. That officer has referred to the documents produced by the petitioner as well as particular of enjoyment on ground, which show that the disputed land constitutes the frontage of the house of the petitioner, and cannot be treated as part of the adjacent street poramboke as per state on ground and that the present demarcation including it in the adjacent street is contrary to the state of affairs on ground The officer also refers to a reply which he got from the Assistant Director of Survey on a reference made to him that the relevant records in connection with the 1927 survey of estate were not available with him and that therefore it was not possible to know whether the section 9 (2) notice was served on the owners or not The officer observed that regarding the conclusiveness of the boundaries as per the earlier survey, the benefit of the doubt should go to the petitioner. After giving his opinion in this manner the Appellate Survey Officer however refused to alter the boundary because in his view he could not do it on account of the fact that " the executive machinery created

under the Estate Abolition Act has considered that the suit land forms part of the adjacent highways road poramboke " Therefore he dismissed the appeal.

The petitioner has come to this Court aggrieved by the above order and seeks for the issue of a writ of *certiorari* under section 226 of the Constitution quashing the above orders of the Appellate Survey Officer. Mr. M. S. Venkatarama Ayyar, learned Counsel for the petitioner, stated that having given his conclusion on the facts in the above manner in favour of the petitioner and having stated that the earlier survey would not bind him, the Appellate Survey Officer ought to have given the appropriate relief under section 11 of the Survey and Boundaries Act and that it was improper for him to decline to make such an order on the ground that the executive authority under the Estate Abolition Act had arrived at a contrary decision. Learned Counsel also referred to the decision of Ramachandra Ayyar, J. in *State of Madras* v. *Karuppiah Ambalam*[1] In that judgment the learned Judge observed that when a village is taken over by the Government under the provisions of the Estates Abolition Act and for the purpose of making a ryotwari settlement, survey is undertaken under section 21 of the Act, it does not mean that the entire provisions of the Survey and Boundaries Act get incorporated in the Madras Act XXVI of 1948, and that such of the provisions of the Survey and Boundaries Act which are inconsistent with or unnecessary for the working out of the provisions of the Estates Abolition Act cannot be attracted in cases of survey held under the latter Act The learned Judge proceeded to hold that in respect of lands in a village taken over by the Government under the Abolition Act, there is no ownership of any private individual till that person obtains ryotwari patta from the Government and that in such cases section 14 of the Survey and Boundaries Act cannot apply as the concerned party could not be held to be a person aggrieved as he had no title to the property before he was granted a ryotwari patta.

I must observe that in the counter-affidavit filed by the Deputy Director of Survey in the present case, there is an averment that the survey under section 21 of the Estates Abolition Act had been effected in accordance with the provisions of Survey and Boundaries Act and that the petitioner could seek his remedy by a civil suit, after publication of a final notification under section 13 of the Survey and Boundaries Act, under section 14. If this position represents the true state of affairs, so far as the estate in the present case is concerned, it may be proper to hold that the decision above cited that section 14 of the Survey and Boundaries Act will not apply to a case of re-survey of estates under section 21 of the Estates Abolition Act may not apply to the circumstances of this case. However, it appears to me that for the purpose of the present writ petition it is not necessary to examine further the above question as to whether the petitioner has a remedy by way of suit, for the following reasons.

It is common ground that both the adjacent highways road poramboke and the petitioner's land formed part of an estate village which was taken over by the Government by the application of the Estates Abolition Act. The petitioner claims the disputed land as an appurtenant to his building The appellate survey officer has also given a categorical finding in his decision that the land is a frontage to the house of the petitioner, and that it could never form part of the adjacent street poramboke as per state of things on ground In such circumstances there will arise a question for decision under section 18 (6) of the Madras Estates (Abolition and Conversion into Ryotwari) Act Section 18 (4) of the Act says:

> " (4) Every building other than a building referred to in sub-sections (1), (2) and (3) shall with effect on and from the notified date, vest in the person who owned it immediately before that date "

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1 (1959) 1 M L J 85

Section 18 (6) says;

"(6) If any question arises whether any building or land falls or does not fall within the scope of sub-sections (1), (2), (3), (4) or (5) it shall be referred to the Government whose decision shall be final and not be liable to be questioned in any Court of law"

Under the subsequent rules, the power to decide this question has been delegated by the Government to the Board of Revenue. In the above circumstances, if the facts are established as claimed by the petitioner that the disputed land is an essential part of his building constituting its frontage and could never form part of the street poramboke, he will be entitled to the appropriate remedy under section 18 (6) of the Estates Abolition Act which he could obtain by an application to the Board of Revenue which has been empowered by the Government to deal with that question. It will not be proper in such circumstances to decide that question by way of writ proceedings in this Court

Therefore while dismissing the petition I give the further direction that it is open to the petitioner to make an application to the Board of Revenue under section 18 (6) of the Estates Abolition Act for getting the appropriate relief if he is found entitled to it. There will be no order as to costs.

V.M.K. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—MR JUSTICE P S KAILASAM

Sellappa Gounder and another .. *Petitioners**

v.

The State of Madras, represented by the Secretary, Home Department, Fort St George, Madras-9 and another . *Respondents.*

Land Acquisition Act (I of 1894), sections 4 (1), 5-A, 6 and 17—Simultaneous notifications under sections 4 (1) and 17 (4) dispensing with section 5-A and under section 6—If justified—Decision of the Government regarding urgency—If subject to judicial review—Land required for providing housing sites for the harijans—Section 17 (2), if satisfied

On the question whether the notification under section 4 (1) and under section 17 (4) of the Land Acquisition Act that the provisions of section 5-A shall not apply and the declaration under section 6 cannot be made simultaneously,

Held that, the law does not make the prior publication of notification under sub-section (1) of section 4 a condition precedent to the publication of a notification under-sub-section (1) of section 6

Somwanti v *State of Punjab*, (1963) 2 S C J 35 : (1963) 2 M L J. (S C.) 18 : (1963) 2 An.W R. (S C) 18 : A I R 1963 S C 151, followed

Held also that, the decision of the Government regarding the urgency is not subject to judicial review except in cases where the order itself suffers from a lacuna or in cases where the Government never applied its mind to the matter or acted *mala fide*

From the materials on record *i.e.*, counter-affidavit, it is clear that the land is required for providing dwelling houses for Harijans (24 families) who are without houses and are poor The requirement under clause (*c*) of sub-section (2) (*b*) (ii) of section 17 that the land can be acquired under section 17 (2) for providing house sites for the poor is satisfied

Observations.—If the instruction contained in the Land Acquisition Manual had been followed, it would have avoided the legal contentions that had been put forward in this case

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* W P No 4318 of 1965 1st August, 1967.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records of the first respondent relating to G O. No. 4256, Home, dated 14th September, 1965, published in Fort St. George Gazette, dated 29th September, 1965, and quash the same.

V. P. Raman for *N R Chandran*, for Petitioners

T. Selvaraj, for Government Pleader, for Respondents.

The Court made the following

ORDER —This petition is filed for the issue of a writ of *certiorari* calling for the records of the State of Madras relating to G O No. 4256, Home, dated 14th September, 1965, published in Fort St. George Gazette, dated 29th September, 1965 and for quashing the same

The petitioners are the owners of Survey No. 250/2-B and S. No 249/1-A in Ariyur Village, Namakkal Taluk, Salem District Regarding this land, the Government issued a notification under section 4 (1) of the Land Acquisition Act on 14th September, 1965 In the same notification, under sub-section (4) to section 17, the Governor directed that in view of the urgency of the case, the provisions of section 5-A shall not apply. On the same date *i e.*, on 14th September, 1965, the Governor also made a declaration under section 6 of the Land Acquisition Act declaring that the lands were needed for public purpose, namely, for making provision for house sites for Harijans of Nadupatti These two notifications are challenged in this writ petition

Mr. V. P. Raman, the learned Counsel for the Petitioners raised three contentions. Firstly, he submitted that the notification under section 4 (1), the dispensing of the provisions under section 5-A and the issuing of declaration under section 6 of the Land Acquisition Act on the same date are illegal and contrary to section 17 (4) of the Land Acquisition Act Secondly, he submitted that the State was not justified in invoking the provisions under section 17 (4) as there was no urgency as contemplated under the section Thirdly, he contended that the acquisition of the house under section 17 (2) (*b*) (ii) (*c*) can only be justified for making provision for houses for the poor and not for Harijans as a claim as there may be Harijan who are rich

So far as the objection of the learned Counsel that the notification under section 4 (1) and under section 17 (4) that the provisions of section 5-A shall not apply and the declaration under section 6 cannot be made simultaneously is concerned, the learned Counsel strenuously relied on the wordings of section 17 (4) which reads:

> "In the case of any land to which, in the opinion of the appropriate Government, the provisions of sub-section (1) or sub-section (2) are applicable the appropriate Government may direct that the provisions of section 5-A shall not apply, and, if it does so direct, a declaration may be made under section 6 in respect of the land at any time after the publication of the notification under section 4, sub-section (1) "

The procedure under the Land Acquisition Act is to make a preliminary notification under section 4 (1) by the appropriate Government stating that the land in a particular locality is needed for any public purpose The powers under section 17 (4) can be invoked in the case of urgency It may be that at the time of the notification under section 4 (1), the Government was satisfied that the land is required urgently and, therefore, may pass an order simultaneously that the Government is satisfied that the provisions of section 17 (1) or 17 (2) are applicable and declare the provisions of section 5-A shall not apply So far, there can be no difficulty. Strong reliance is made on the words "a declaration may be made under section 6 in respect of the land at any time after the publication of the notification under section 4, sub-section (1)" It was contended that the words 'a declaration under section 6 may be made after the publication of the notification

under section 4, sub-section (1)' would contemplate an earlier publication of the notification under section 4, sub-section (1) to be followed by a declaration under section 6 and, therefore, the two notifications cannot be made simultaneously

The Supreme Court in *Somawanti* v *State of Punjab*[1], in answering the contention that notifications under section 4 (1) and section 6 cannot be made simultaneously observed as follows :—

"But it seems to us that where there is an emergency by reason of which the State Government directs under sub-section (4) of section 17 of the Act that the provisions of section 5-A need not be complied with, the whole matter, that is, the actual requirement of the land for a public purpose must necessarily have been considered at the earliest stage itself that is when it was decided that the compliance with the provisions of section 5-A be dispensed with. It is, therefore, difficult to see why the two notifications cannot, in such a case be made simultaneously. A notification under sub-section (1) of section 4 is a condition precedent to the making of notification under sub-section (1) of section 6 If the Government, therefore, takes a decision to make such a notification and, thereafter, takes two further decisions, that is, to dispense with compliance with the provisions of section 5-A and also to declare that the land comprised in the notification is in fact needed for a public purpose, there is no departure from any provision of the law even though the two notifications are published on the same day."

The Court proceeded to observe that the law does not make the prior publication of notification under sub-section (1) of section 4 a condition precedent to the publication of a notification under sub-section (1) of section 6 The decision negatives the contention of the learned Counsel. Following the decision, I hold that the objection that the notification under section 4 (1) and the declaration under section 6 cannot be made simultaneously has to be rejected In this connection it will be useful to refer to the decisions given in the Land Acquisition Manual complied by the Madras Government at page 89 They are as follows —

"In cases in which exemption from the operation of section 5-A of the Act is recommended and the Collector submits both the notification under section 4 (1) and the declaration under section 6, they may be sent together to the press, but they should not both be published in one issue of the Gazette. The latter should be published a week after the former. The schedule of lands should be published with the notification under section 4 (1) and the declaration under section 6"

These directions are by way of abundant caution and if followed would avoid the objections that are raised in the present petition.

The next contention of the learned Counsel is that the decision whether there was an urgency or not is justiciable and the Court would be entitled to look into the facts of each case. The Supreme Court in *Raja Anand* v *State of U P.*[2] observed.

"It is true that the opinion of the State Government which is a condition for the exercise of the power under section 17 (4) of the Act, is subjective and a Court cannot normally enquire whether there were sufficient grounds or justification of the opinion formed by the State Government under section 17 (4)."

After citing with approval the decision in *King Emperor* v *Sibanath Banerjee*[3], and referring to the decision of the Supreme Court in *Jaichand Lal Sethia* v. *State of West Bengal*[4], the Court observed.

"But even though the power of the State Government has been formulated under section 17 (4) of the Act in subjective terms the expression of opinion of the State Government can be challenged as *ultra vires* in a Court of law if it could be

1 (1963) 2 S.C.J 35 (1963) 2 M L J (S C) 18 (1963) 2 An W R (S C) 18 A I R 1963 S C. 151 at 171

2. (1967) 2 S.C.J 830 A I R 1967 S C 1081 at 1085.

3 (1945) 2 M L J 325 L R (1945) 72 I A 241 (1945) F C R 195 (1945) F L J 222 A.I R 1945 P.C. 156

4. (1967) 2 S C J 170 (1967) M.L.J. (Crl.) 601 A.I.R. 1967 S C. 483

shown that the State Government never applied its mind to the matter or that the action of the State Government is *mala fide*."

The exceptions mentioned in the decision which would enable a party to challenge the opinion of the State Government are that the State Government never applied its mind to the matter or that the action of the State Government is *mala fide*.

Dealing with the satisfaction of the Government required under rule 30 of the Defence of India Rules, 1962, the Supreme Court in *Jaichand Lal Sathia* v *State of West Bengal*[1], has held that the satisfaction is a subjective satisfaction and that a Court cannot normally enquire whether grounds existed which would have created the satisfaction on which alone the order could have been made in the mind of a reasonable person; if, therefore, an authenticated order of detention is on its face regular and in conformity with the language of rule 30 it is not ordinarily open to a Court to enter into an investigation about the sufficiency of the material on which the order of detention is based The Supreme Court quoted with approval the law stated in *King Emperor* v. *Shibnath Bannerjee*[2], There the Privy Council stated :

"In the normal case the existence of such a recital in a duly authenticated order will, in the absence of any evidence as to its inaccuracy, be accepted by a Court as establishing that the necessary condition was fulfilled "

The Supreme Court in summing up the position held as follows at page 486 :

"The accuracy (of a recital) can be challenged in two ways either by proving that the State Government never applied its mind to the matter or that the authorities of the State Government acted *mala fide*. In a normal case the existence of such a recital in a duly authenticated order will in the absence of any evidence as to its inaccuracy, be accepted by the Court as establishing that the necessary condition was fulfilled. In other words, in a normal case the existence of such a recital in a duly authenticated order that the State Government was satisfied will, in the absence of any evidence to the contrary, be accepted by the Court as establishing that the State Government was so satisfied If the order of detention itself suffers from any lacuna, it is open to a Court in a proper case to call for an affidavit from the Chief Minister or other Minister concerned or to call for the relevant file from the State Government in order to satisfy itself as to the accuracy of the recital made in the order of detention "

Thus it will be seen that normally an affidavit or the records will not be called for if the order *prima facie* discloses that the Government was satisfied If the order suffers from any lacuna, an affidavit can be called for The case where the State Government never applied its mind to the matter or where the State Government acted *mala fide* is different.

In *Natesa Asari* v *State of Madras*[3], a Division Bench of this Court in considering the scope of the challenge to the satisfaction of the Government as to the state of urgency under section 17 (4) held that what was required under section 17 (4) is that the Government must be satisfied that there was such urgency as is contemplated under section 17 (1) and if it was so satisfied it was entitled to pass an order under section 17 (4) dispensing with the application of section 5-A The submission that there was no urgency in this case as would justify invoking the provisions under section 17 (1) and that there was no enquiry about such urgency was rejected on the ground whether an urgency existed or not was a matter solely for the determination of the Government and was not a matter for judicial review A recent decision of a Bench of this Court in *Mohamed Habibullah* v *Special Deputy Collector*[4], followed the decision in *Natesa Asari* v *State of Madras*[3], and held whether urgency existed or not is a matter solely for the determination of the Government and it is not a matter

1 (1967) 2 S C J 170 (1967) M L J (Crl) 325 601 A I R 1967 S C 483
2 (1945) L R 72 I A 241 at 261 (1945) F L R 195 (1945) F L J 222 (1945) 2 M L J 118
3 (1953) 2 M L J 684 66 L W 599
4 (1967) 2 M L J 531 A I R 1967 Mad.

for judicial review In *Nagamalai Colony Formation Association* v *State of Madras*[1], in considering the scope of the Government's satisfaction regarding the urgency, a Bench of this Court has found that no objective criterion is laid down to guide the Government and that the sub-section does not even use the words like, that the Government should be reasonably satisfied as to the existence of the condition. Taking this consideration that steps will have to be taken under section 17 (4) in cases of urgency, the Court expressed its view that it would be hampering the freedom of swift action if an objective investigation were to be prescribed The Bench also followed the view expressed in *Natesa Asari* v. *State of Madras*[2]

Thus it will be seen that three Division Benches of this Court have taken the view that the question whether urgency exists or not is a matter solely for the determination of the Government and it is not a matter for judicial review Reading these decisions along with the decisions in *Jaichand Lal Sathia* v. *State of West Bengal*[3], and *Raja Anand* v. *State of U P.*[4], the position of law is clear that the decision of the Government regarding the urgency is not subject to judicial review except in cases where the order itself suffers from a lacuna or in cases where the Government never applied its mind to the matter or acted *mala fide* A view somewhat different is expressed by a Bench of this Court in W.P. No 1655 of 1964. The Court held :

> " The question in each case for the Government to consider when it desires to invoke section 17 (4) would be whether facts and conditions exist or require that would not brook the delay which would be caused by applying section 5-A. A decision on that question will have to be taken on proper material and in an objective manner, neither capriciously nor whimsically. But when the Court is called upon to see whether the power in invoking urgency provisions has been properly exercised, it has necessarily to examine whether the decision to invoke the provisions was based on material and was neither arbitrary nor capricious nor *mala fide*."

The scope of the judicial review according to this decision is wider than that as envisaged by the two decisions of the Supreme Court in *Jaichand Lal Sethia* v. *State of West Bengal*[3], and *Raja Anand* v *State of U P* [4] Neither the decisions of the Supreme Court nor that of the Privy Council in *King Emperor* v. *Sibnath Bannerjee*[5], nor the three Division Bench decisions of this Court in *Natesa Asari* v *State of Madras*[2], *Nagamalai Colony Formation Association* v. *State of Madras*[1], and *Mohammed Habibullah* v. *Special Deputy Collector*[6], were brought to the notice of the learned Judges. With respect I feel bound by the two decisions of the Supreme Court and the three Division Bench judgments referred to above and hold that the decision of the Government regarding the existence of the urgency is not justiciable except on the grounds specified in the decisions The Court will not be entitled to go into the question whether the decision was taken on proper material and in an objective manner In this view I am unable to agree with the decisions of a single Judge of this Court in *Periathambi Mudaliar* v *Special Tahsildar (L A)*[7] W P. No. 795 of 1962 and in W.P No. 505 of 1961.

The next point urged by the learned Counsel is that the notification requiring the lands for the purpose of providing the harijans with house sites is not one contemplated under section 17 (4) of the Land Acquisition Act and therefore the notification under section 4 (1) and the declaration under section 6 which states that the land is required as house-sites for harijans are illegal This argument is based on the wording of section 17 (2) (*b*) (ii) (*c*) which makes the procedure under section 17 (2) applicable in cases of acquisition for any dwelling house for the poor It is contended

1. I L R (1965) 1 Mad 741 at p 751.
2. (1953) 2 M L J 684 66 L W 999
3 (1967) 2 S C J 170 (1967) M L J (Crl) 601 A I R 1967 S C 483
4. (1967) 2 S C J 830 A I R 1967 S C 1081
5. (1945) F L R 195 · (1945) F L J 222 · (1945) 2 M L J 325 L R (1945) 72 I A 1241
6 (1967) 2 M L J 531 A I R 1967 Mad. 118
7 I L R (1965) 2 Mad 416 A.I R 1965 Mad. 328

that acquisition for construction of houses for the harijans need not necessarily be acquisition for providing dwelling houses for the poor for some of the harijans may be rich. The answer to this contention is two fold by the State. Firstly it is submitted that the notification is one under section 17 (1) and as such may be upheld. It provides that when the Government is satisfied about the existence of urgency, it can invoke the provision under section 17 (4) if the land sought to be acquired is waste or arable land. Section 17 (1) is not applicable to lands which are not waste or arable It is only with regard to the lands which do not fall under the category of arable lands, the question whether the land is intended for dwelling houses for the poor would have to be gone into. It is unnecessary to consider-this question at any length in this case for it is clear from the counter-affidavit that the notification in this case is under section 17 (1) and on the merits it is seen that the land is required for 24 families who are harijans badly in need of the house sites. Thus on the materials on record it is clear that the land is required for providing dwelling houses for harijans who are without houses and are poor. The requirement under clause (c) of sub-sction (2) (b) (ii) of section 17 that the land can be acquired under section 17 (2) for providing house sites for the poor is satisfied. In this connection it is useful to refer to the directions given in the Land Acquisition Manual compiled by the State Government At page 85 of the Manual it is directed :

> " When land is required for providing house sites for members of the scheduled castes or other labouring classes or of a co-operative society, the names of the members to whom it is intended to assign the land when acquired should be given in the notice issued under sections 4 (1) and 5-A together with the extents proposed to be given to each."

This instruction if followed would avoid the legal contentions that have been put forward in this case. It may not be necessary that in the notifications under section 4 (1) and 5-A these particulars should be given but it is desirable to follow such a course.

In the result all the contentions raised by learned Counsel for the petitioners are rejected. The writ petition is dismissed. There will be no order as to costs.

V.M.K. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

Madras Bolts and Nuts (P.) Limited . *Petitioner**

v.

The Presiding Officer, Labour Court, Pondicherry and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 10—Reference under, of dispute affecting a large number of workers—Validity of if can be questioned on the ground that it was not made at the instance of a representative body

An objection to the effect that a reference under section 10 of the Act is invalid because the reference was not made on the representation of a union having a representative character to represent the workers, will have very little substance after the matter has come before the Labour Court and there is no dispute at all that the issue raised for decision affect not an individual worker, but a large number of workmen When a dispute affects a number of workmen there is no question of its being considered a collective dispute by reason of the fact that there has been a sponsoring of the dispute by a representative body In such circumstances there can be no valid objection to the reference on the ground, that it was not made at the instance of a representative body.

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* W P No. 1785 of 1965 19th December, 1967.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to call for the records in I.D No V of 1964 on the file of the Presiding Officer, Labour Court, Pondicherry and to issue a writ of prohibition restraining the 1st Respondent from proceeding with the said I D No V of 1964 on his file

A S. Raman, for Petitioner.

M. Ramachandra Rao, for 2nd Respondent

The Court made the following

ORDER —The State of Pondicherry made a reference under section 10 of the Industrial Disputes Act, 1947 to the Labour Court on the following points for adjudication : (1) Whether the closure of the factory *viz*, the Madras Bolts and Nuts (Private) Limited, Muthialpet, Pondicherry, is justified and(2) if so, to what relief the workers are entitled to and to compute the relief, if any, awarded in terms of money. The concerned notification of the Government states that the workers of the concern were represented by the INTUC

When the reference came up before the Labour Court at Pondicherry for adjudication, a preliminary objection was raised by the Management that the reference was not valid on account of several reasons, all of which were rejected by the lower Court, except one objection about the capacity of one M.J. Vincent to represent the workers before the Labour Court. All other points by way of preliminary objection were held against the Management and in favour of the workers This writ petition is filed by the Management and it is urged on its behalf by its Counsel that the finding of the lower Court on one of the preliminary points about the representative character of the INTUC to represent the workers is not correct. Consequently, the reference made by the Government under section 10 of the Industrial Disputes Act, based on the improper representation of the INTUC on behalf of the workers, must be considered to be invalid.

I am of the opinion that this objection will have very little substance after the matter has come before the Labour Court, and there is no dispute at all that the issue raised for decision affects not an individual worker, but a large number of workers. In fact, according to the notice which the Management itself served on the workers at the time of the alleged closure, 17 workers were referred to as permanent workers It is these workers who have raised the objection that there was no occasion for a closure of the concern in the present case and this dispute is covered by the first point for adjudication The several decisions which the learned Counsel for the petitioner referred to, dealing with the question whether there has been proper sponsoring by a union of a dispute, to give it a collective character, are cases where the dispute *prima facie* affected an individual workman For example, in *Bombay Union of Journalists* v. "*Hindu*" *Bombay*[1], the Supreme Court has more than once made mention of the fact that the dispute in that particular case was *prima facie* an individual dispute It was in such circumstances the Supreme Court observed that in order that such a dispute might become an industrial dispute it had to be established that it had been taken up by the Union of employees of the "The Hindu" Bombay, or by an appreciable number of employees of "The Hindu", Bombay. In the present case, as mentioned already the dispute clearly affected a number of workmen, and there was no question of its being an individual dispute which had to be considered as a collective dispute by reason of the fact that there has been a sponsoring of the dispute affecting an individual by a representative body of the employees of the concern That apart, in the present case, the order of the Labour Court has referred to certain correspondence that passed between the Management and the various labour unions which show that as late as 28th October, 1964, shortly before the notification, the Management addressed a letter to the President of the INTUC with a copy of the letter to the Workers National Trade Union on a matter

1 (1962) 2 S C J 107 (1962) 2 S C R 893.

relating to the claim of bonus for the workers of this particular Management It is clear from the data thus afforded that both the Workers National Trade Union and the INTUC had been sponsoring the cause of the workers of this concern It is by such sponsoring of their cause, that the matter came before the State Government and which led to the reference under section 10 The dispute that has thus come before the Labour Court appears from its very inception to be a dispute affecting a large number of workers of the petitioner-Management In such circumstances there can be no valid objection to the reference by the Government because the dispute was clearly of a collective character

The Writ Petition, is, therefore, dismissed with costs

Advocate's fee Rs 150.

V.K. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT .—MR. JUSTICE A. ALAGIRISWAMI

Lingappa Gounder .. *Petitioner**

v.

Palaniswami Gounder .. *Respondent.*

Madras Cultivating Tenants (Payment of Fair Rent) Act and Rules (1956), *Rule* 8—*Scope—Rent Court or Rent Tribunal—If has power to appoint Commissioner to make local inspection.*

It is true, there is no provision for appointment of a Commissioner to make local inspection under the Madras Cultivating Tenants (Payment of Fair Rent) Act and Rules, 1956 But under rule 8, in hearing an application under the Act the Rent Court shall have also power to depute any officer of the Revenue Department not lower in rank than a Revenue Inspector to make local enquiry and inspection and to collect relevant data This in substance amounts to power to appoint a Commissioner. But the power could be exercised only by a Rent Court and not by a Rent Tribunal

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Munsif Court of Tiruppur in I A No 955 of 1967 in R.A. No. 1 of 1967.

C. Chinnaswami and *B Ramamurthi*, for Petitioner.

R. Kallappan, for Respondent.

The Court delivered the following

JUDGMENT.—This is a petition to revise the order of the learned District Munsif, Tiruppur, as the Rent Tribunal, dismissing the petitioner's application for appointment of a Commissioner The petitioner applied in the Rent Court for fixation of fair rent and fair rent was fixed at Rs. 1,100 He filed an appeal to the Rent Tribunal against that order He applied for the appointment of a Commissioner to make a local inspection It was contended on behalf of the respondent-landlord that there was no provision in the Madras Cultivating Tenants (Payment of Fair Rent) Act, for the appointment of a Commissioner, that the petitioner had applied for local inspection and the Rent Court had made a local inspection on 30th December, 1966, and that there was no necessity to issue a fresh commission when there was already a report with regard to the condition of the property The Rent Tribunal holding that the provisions in the Civil Procedure Code for the appointment of a Commissioner is not applicable to Rent Tribunal, dismissed the petition It also held that when a local inspection had also been made by the Rent Court, there was no necessity to issue a commission again for making a local inspection. It is ture, there is no provision for appointment of a Commissioner under the Madras

*C R.P. No. 2100 of 1967. 19th December, 1967.

Cultivating Tenants (Payment of Fair Rent) Act and Rules, 1956. Under rule 4 (i), every Rent Court and Rent Tribunal constituted under the Act shall have the powers exercisable by a civil Court in the trial of suit and in appeals. Under sub-rule (ii) the proceedings of the Rent Court and the Rent Tribunal shall be summary and shall as far as possible be governed by the provisions of the Civil Procedure Code with regard to the issue and service of summons, the examination of parties and witnesses, the production of documents, the amendment of pleadings, addition of parties, the passing of *ex parte* orders and setting them aside for good cause, ordering dismissal for default of appearance and setting aside such orders for good cause, the reviewing of orders passed on ground of apparent error, local inspection, and the passing of orders Thus, it would be seen that there was no express provision for appointment of a Commissioner even though there is a power to make local inspection. But under rule 8, in hearing an application under the Act, the Rent Court shall have also power to depute any officer of the Revenue Department not lower in rank than a Revenue Inspector to make local enquiry and inspection and to collect relevant data. The officer so deputed shall submit a report of such enquiry and inspection in writing and this report shall be part of the evidence of the case This in substance amounts to power to appoint a Commissioner. The petitioner's application for appointing a Commissioner need not have been literally construed and rejected on the ground that there is no power to appoint a Commissioner. What matters is the substance of a request and not the form in which it was couched or the name given to it The question always is whether the Court has got the power to do in substance what is wanted by a petitioner. There is no doubt that if the Rent Court thought it necessary, it had the power to depute an officer under Rule 8 for making local enquiry and inspection. An officer so deputed would in substance be a Commissioner and the provision of that rule makes it clear that even in respect of his report, the opportunity to file objections is similar to the procedure regarding the filing of objections to a Commissioner's report. Thus, though it is true that the provision of rule (i) which enables the Rent Court and Rent Tribunals to exercise the power exercisable in a civil Court in the trial of suit and in appeals does not enable them to appoint Commissioner, the power under rule 8 tantamounts the power to appoint a Commissioner. But the power could be exercised only by a Rent Court and not by a Rent Tribunal as in this case There is further the fact that in this case the Rent Court had already made an inspection and that was one of the circumstances which was taken into consideration by the Rent Tribunal in refusing the petitioner's request for appointment of a Commissioner. In the circumstances of this case, even if the Rent Tribunal had the power to depute an officer under rule 8, it should be held that it has exercised its discretion properly in refusing to appoint a Commissioner or depute an officer under rule 8.

The Civil Revision Petition is, therefore, dismissed There will be no order as to costs.

V.K. ——— *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

V. S. Raju Naidu . *Petitioner**

v.

Commissioner of Civil Supplies, Board of Revenue (C.S.) Chepauk, Madras-5 .. *Respondent.*

Rice Milling Industry (Regulation) Act, (Central Act XXI of 1958), *sections* 3, 3 (b), 6 (1) *and* 25—*Petitioner running the rice mill under Panchayat Board licence—But licence under the State Licensing Order not obtained—Central Act repealing the State Rules and enactments relating to the regulation of rice mills—Petitioner's rice mill, if an " existing rice mill " under section* 3 (b) *of the Act.*

Under the licence granted by the Panchayat Board and after the approval given to the mill building by the District Health Officer, the petitioner had been running the rice mill. Under rule 2 of the Madras Rice Mills Licensing Order, 1955 framed under section 3 of the Madras Essential Articles Control and Requisitioning (Temporary Powers) Act, 1949, no person shall mill rice etc. except under and in accordance with the terms and conditions of a licence issued in that behalf by the licensing authority. The petitioner did not obtain the licence under the Order, but continued to work the rice mill. Under section 25 of Central Act XXI of 1958, the Rice Milling Industry (Regulation) Act, 1958, the State Rules and enactments relating to the regulation or control of rice mills in the State stood automatically repealed. His application to the Collector for the grant of a licence for his rice mill in accordance with the provisions of the Central Act and forwarded to the Board of Revenue was rejected by the Board of Revenue Appeal to the Government also failed. Again his application, under section 6 of the Act for a licence on the ground that his mill was an "existing rice mill," as defined in section 3 (*b*) of the Act and forwarded to the Board of Revenue (Commissioner, Civil Supplies) was rejected on the ground that a mill run " clandestinely " would not come within the definition of " existing rice mill " in section 3 (*b*) of the Act. Is he entitled to the licence under section 6 (1) ?

Held that, there is nothing to show that the petitioner was carrying on rice-milling operations clandestinely In fact, he has clearly referred to a licence granted by the Panchayat Board and also the approval given by the District Health Officer to the mill building. The petitioner claims ignorance of the requirements of obtaining a licence from the Collector under the State Order. But all these circumstances, including the question of prosecution for contravention of State Order, cannot be brought into the picture in his application under section 6 of the Act, for a licence, when the Central Act does not impose any such restrictions upon an existing mill, as are stated in the order of the Board of Revenue. The three categories of mills mentioned in section 3 are required to satisfy only the conditions mentioned in the definition and nothing further, to enable them either to obtain a permit under section 5 or a licence under section 6. Therefore the appropriate authority shall grant the licence in conformity with the requirements of section 6 of the Central Act

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the respondent herein to instruct the licensing authority to issue a licence to the petitioner for his rice mill under section 6 (3) of Central Act XXI of 1958 without further loss of time.

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* W P. No. 1383 of 1965 20th December, 1967.

R Kunchithapadam, for Petitioner

S T Ramalingam, for the Government Pleader, for Respondent

The Court made the following

ORDER —This writ petition is filed by one V S Raju Naidu of Vadapatti Village, Coimbatore district, for the issue of writ of *mandamus* under Article 226 of the Constitution in the following circumstances According to the affidavit filed by the petitioner, he has been running a rice mill under the name and style of "Venkatesa Rice Mill" under licence No 3/54 granted by the Vedapatti Panchayat by its resolution passed on 12th September, 1954 The District Health Officer, Coimbatore, had inspected the site and building and given approval to them by order passed on 6th September, 1954 The petitioner also entered into an agreement with the Madras Electricity Board for consumption of electricity for a period of ten years in his mill which is worked by a huller equipped with a 7 5 H P. electric motor He has been paying the minimum charges to the Electricity Board The Madras Rice Mills Licencing Order, 1955, was published in the Fort St George Gazette on 26th January, 1955 Under rule 2 of this Order, which was framed under section 3 of the Madras Essential Articles Control and Requisitioning (Temporary Powers) Act, 1949, no person shall mill rice or hull paddy, or otherwise subject rice or paddy to any processing, by power-driven machinery except under and in accordance with the terms and conditions of a licence issued in that behalf by the licensing authority Admittedly, the petitioner did not obtain a licence under the abovesaid Order but continued to work the rice mill According to him, he was ignorant that a separate licence had to be obtained under the aforesaid Order from the District Collector He was under the impression that the licence issued by the Panchayat Board would be sufficient for the purpose Central Act XXI of 1958 (hereinafter referred to as the Act)—The Rice-Milling Industry (Regulation) Act, 1958—received the assent of the President on 18th May, 1958 Under section 25 of that Act the State Rules and enactments relating to the regulation or control of rice mills in the State stood automatically repealed Therefore, the Madras Rice Mills Licensing Order, 1955, was also repealed with effect from 18th May, 1958 In April, 1959 the petitioner applied to the Collector of Coimbatore for the grant of a licence for his rice mill in accordance with the provisions of the Act. This application was forwarded to the Board of Revenue which rejected it on 16th August, 1961, on the ground that there was want of adequate paddy in the village. The petitioner appealed to the Government and the appeal was also rejected The petitioner thereafter applied to the Collector of Coimbatore on 3rd April, 1963, under section 6 of the Act for a licence, taking his stand that his mill was an "existing rice mill," as defined in section 3 (*b*) of the Act The Collector forwarded this application to the Board of Revenue with his recommendations. The Board after giving notice to the petitioner and holding an enquiry passed final orders on 7th January, 1965, stating that since the petitioner had been running his rice mill without a licence it must be presumed that he was working the mill "clandestinely" that a mill of that kind would not come within the definition of "existing rice mill" in section 3 (*b*) of the Act and that therefore the petitioner would not be entitled to the grant of licence under section 6 (1) of the Act. It is against this order that the petitioner has filed this writ petition seeking for a writ of *mandamus* directing the respondent, Commissioner of Civil Supplies, Board of Revenue, to issue a licence to him for his rice mill under section 6 of the Act

Learned Counsel appearing for the petitioner contends that there is nothing in the Act to put any qualification in the definition of "existing rice mill" in section 3 (*b*) so as to make that definition applicable only to rice mills which had, at the commencement of the Act, been operating under a permit granted by the State under the Licensing Order of 1955. The definition in section 3 (*b*) runs thus:

"'Existing rice mill' means a rice mill carrying on rice milling operations at the commencement of this Act, and includes a rice mill in existence at such

commencement which is not carrying on rice milling operations but in which ricemilling operations have been carried on at any time within a period of one year prior to such commencement."

Learned Counsel for the petitioner submits that under section 6 of the Act any owner of an "existing rice mill" as defined above, is entitled to make an application to the licensing officer for the grant of a licence for carrying on rice milling operation in that rice mill On receipt of the application in the prescribed form the licensing officer is required to grant the licence subject to certain conditions, including conditions relating to the polishing of rice etc.

At this stage a reference can be made to section 25 of the Act. There are both repealing and saving clauses in section 25 of the Act. The first part of section 25 repeals the State Order The second part states that notwithstanding any such repeal, any "permit or licence granted in respect of any existing rice mill under any such law or order hereby repealed and in force immediately before the commencement of this Act shall continue to be in force for such period as may be allowed under the proviso to sub-section (2) of section 8 for the licensing of such rice mill under the provisions of this Act" Section 8 (2) of the Act states.

"No owner of a rice mill shall, after the commencement of this Act, carry on rice milling operation except under and in accordance with a licence granted under section 6

Provided that nothing in this sub-section shall apply to an existing rice mill for such period as may be specified in this behalf by the Central Government by notified order."

Section 8 (2) read with section 25 (2) means that if an existing rice mill has got a licence granted under the State Rice Mills Licensing Order that licence will continue to be valid for such period after the coming into force of the Act as may be specified by the Central Government by a notified order under section 8 (2) of the Act. What the proviso to section 8 (2) read with section 25 (2) would mean is that an existing rice mill owner cannot carry on rice milling operations after the commencement of the Act unless he was in possession of a licence granted under the State Government's order, which was in force at the commencement of the Act and that licence will be valid for such period as may be specified by the Central Government by its order under the proviso to section 8 (2) But the petitioner's request is not to validate his carrying on the rice milling operations after the commencement of the Act, but his claim is that be is eligible by reason of his owning an existing rice mill, for grant of a licence under section 6 (1), without an examination of the question whether he was in possession of a licence under the Madras State Order before the Central Act came into force The contention of the respondent is that such a licence is necessary If we want to impose such a restriction on his eligibility for the grant of licence, it would require that the definition of "existing rice mill" in section 3 (*b*) would have to be amplified, so as to mean a rice mill for which the owner has a licence under the appropriate Madras Government Order Section 6 would also have to be suitably modified so as to make it a condition that the existing rice mill should have a licence before it can be granted a fresh licence under the Act As long as such qualifications are not found in the Act, it would not be proper to impose a further restriction as the Board of Revenue has done, that unless there is a valid pre-existing licence under the State Order the owner of an existing rice mill will not be entitled to a licence under section 6 of the Act

The Board has given some further reasons by stating that the recognition of the petitioner's eligibility, in the circumstances, would amount to countenancing the act of his carrying on rice-milling operations before the commencement of the Act without a licence But that is a different matter altogether. It should have been dealt with under the appropriate provisions of the State law, if he had contravened the State Order There is also one further comment to be made. There

is nothing to show that the petitioner was carrying on rice-milling operations clandestinely In fact, he has clearly referred to a licence granted by the Panchayat Board and also the approval given by the District Health Officer to the mill building. The petitioner claims that he was ignorant of the requirements of obtaining a licence from the Collector under the State Order How far this explanation can be accepted is a matter which will arise in the context of any prosecution for contravention of the State Order, if a prosecution had been filed in time But all these circumstances cannot be brought into the picture in his application under section 6 of the Act, for a licence, when the Central Act does not impose any such restrictions upon an existing rice mill, as are stated in the order of the Board of Revenue

It would appear that the Central Act wanted to start on a clean slate so far as the rice milling industry is concerned, untrammelled by the previous State Orders regarding licensing and so on, which were all repealed The mills were to be classified into three categories mentioned in section 3, namely, 'defunct rice mill,' 'existing rice mill,' and 'new rice mill.' These three categories are required to satisfy only the conditions mentioned in the definition, and nothing further, to enable them either to obtain a permit under section 5 or a licence under section 6. In view of the above considerations, I am of the opinion that the order of the respondent in this case cannot be supported I may also add that in the counter-affidavit of the respondent it has been admitted that the petitioner had been running a rice mill from 1954 to 1959 Therefore, he was carrying on ricemilling operations in his rice mill at the date of commencement of Act XXI of 1958. In the above circumstances, a writ will issue as prayed for, directing the respondent to give the necessary directions to the appropriate authority for the grant of a licence to the petitioner in conformity with the requirements of section 6 of the Act No order as to costs.

V.M.K. *Petition allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT :—MR. JUSTICE P. S. KAILASAM

K. Venkatachalam and others .. *Petitioners**

v.

The Management of Ashok Leyland Ltd., Ennore, and others .. *Respondents.*

Industrial Disputes—Contract labour system—Introduction of in the sphere of chassis delivery work of a passenger and lorry chassis manufacturer—Whether justified.

Industrial Disputes Act (XIV of 1947), *section* 10 (4)*—Duty of tribunal to confine itself to points referred*

The question in the instant case is whether the demand for the abolition of the contract in the sphere of chassis delivery work of the respondent-company, manufacturing passenger and lorry chassis, and for absorbing all the convoy leaders as regular workmen, is justified It is found that the work was intermittent and that the convoy leaders have to wait for three to six weeks for work depending upon the distance of the route, and during that period they are not paid. The work was confined only to about ten to twelve days in a month and was not perennial in nature The delivery of the chassis at the destination of the buyer cannot be said to be incidental to the manufacturing process It would not also be feasible to engage some convoy leaders on permanent basis or absorb some of them permanently, as the convoy will have to be moved without any delay Applying the test laid down by the Supreme Court in *Standard Vacuum Refining Company* v *Their Workmen*, A I R. 1960 S C 948, as the work is intermittent,

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* W.P Nos. 2096 and 2531 of 1966 22nd December, 1967.

as it is not possible to employ the convoy leaders as full time workmen, the decision of the management to resort to contract system cannot be assailed

Under section 10 (4) of the Industrial Disputes Act, it is the duty of the Tribunal to confine its adjudication to the points referred to it for adjudication and matters incidental thereto

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavits filed therewith the High Court will be pleased to issue writs of *certiorari* calling for the records pertaining to I. D. No 39 of 1965 on the file of the Industrial Tribunal, Madras (second respondent in W.P. No. 2096 of 1966 and 1st respondent in W P No. 2531 of 1966) and quash the award made therein dated 2nd March, 1966 and published in the *Fort St. Gazette* dated 30th March, 1966 in Supplemental II, section 1, page 11.

B. R. Dolia of *Aiyar* and *Dolia*, *G. Venkataraman* and *V. C. Srikumar*, for Petitioners.

V. K. Thiruvenkatachari for *King & Partridge*, for Respondents.

The Court made the following

ORDER.—Writ Petition No 2096 of 1966 is preferred by three convoy drivers working in the Ashok Leyland Limited, Ennore, and W.P No. 2531 of 1966 by the Ashok Leyland Workers' and Staff Union, praying for the issue of a writ of *certiorari* calling for the records of the Industrial Tribunal, Madras, in I.D. No. 39 of 1965 and quash the award made by it on 2nd March, 1966, and published in the *Fort St. George Gazette*, dated 30th March, 1966

The case of the petitioners is that the three petitioners in W.P. No. 2096 of 1966 joined the first respondent company as convoy drivers and subsequently appointed as convoy leaders. The first respondent company used to entrust the convoy leaders, passenger and lorry chassis for being delivered to dealers throughout India, and the petitioners had effected delivery in places like Jammu and Kashmir, Allahabad, etc. They were paid a daily batta of Rs. 7. The respondent-company had sixty-two convoy leaders working under them. The petitioners and the other convoy leaders approached the management for confirming them as permanent workmen and for regularising their scale of pay, etc. The first respondent promised to consider the request; but subsequently entrusted the work of delivery of chassis to certain contractors The petitioners felt aggrieved, as they apprehended that the introduction of the contract system would throw them out of employment. They raised an industrial dispute, and the dispute was referred by the Government by G O.Rt. No. 1906 dated 17th September, 1965 to the Industrial Tribunal, Madras The terms of reference were as follows :—

> "Whether the demand for abolition of contract system in the sphere of chassis delivery work and absorption of the 62 convoy leaders as regular workers is justified, if so to what relief they would be entitled."

The reference was taken up by the Industrial Tribunal in I D. No. 39 of 1965. The Tribunal framed the following three issues:—

> " 1. Has the Tribunal jurisdiction to decide the reference ?
>
> 2. Is the Union competent to raise the present dispute ? and
>
> 3. Is the demand for abolition of the contract system in the sphere of chassis delivery work and absorption of the convoy leaders drivers as regular workers justified and if so, to what reliefs they would be entitled ?

The Tribunal held that though the convoy leaders were not regular workmen they could be classified as temporary workmen and the Tribunal therefore had jurisdiction to decide the dispute It also held that the convoy leaders, fifty-two in number, by themselves could raise the dispute which would be an industrial dispute So far as these two issues are concerned, there is no dispute, as the learned Counsel for the respondent conceded that the Tribunal had jurisdiction and the Union was competent to raise the dispute. In the circumstances, it is unneces-

sary to discuss the two issues any further Regarding the third issue, the Tribunal found that the convoy leaders were not justified in demanding the abolition of the contract system in the sphere of chassis delivery work It also found that the demand of the convoy leaders to be absorbed as regular workers is not justified.

The third issue may be considered The terms of reference are set out already The question is whether the demand for the abolition of the contract system in the sphere of chassis delivery work and for absorbing all the convoy leaders as regular workmen is justified Certain documents were filed to show as to how the convoy system of delivery of chassis was working. Exhibits M-4, M-5, and M-6 are convoy duty registers relating to short distance and long distance drivers The convoy leaders are not sent every day in a month, but only on some days in a month. On an analysis of the registers for the months of September, October, November and December, 1963 and January and February, 1964, it will be seen that there were no convoys for 16 days in September, 1963, for 20 days in October, 1963, for 20 days in November, 1963, for 18 days in December, 1963, for 19 days in January, 1964 and for 18 days in February, 1964 It has also been found that a convey leader who goes to Delhi takes about twenty days for his return and during the twenty days of this absence other people have to be engaged for going to other places. In the circumstances, it will not be possible for the management to employ only a limited number of persons, as the movement of the chassis will be unduly delayed, if they had to wait for the convoy to return before another convoy is sent. It is stated that delivery will have to be made as and when it becomes necessary expeditiously It is also clear from the records that a short distance convoy leader will have to wait for three weeks for his next chance and a long distance convoy driver will have to wait for six weeks For the period of this three weeks for a short distance convoy leader and six weeks for a long distance convoy leader, no work is provided by the company and they are not paid by the management It is also clear that the management cannot be expected to engage all the sixty-two persons as convoy leaders and keep them idle for three or six weeks by paying them for the period for which they are not given any work While the company cannot engage all the convoy leaders, it cannot also employ a lesser number of men and put them on permanent basis As already pointed out, the company cannot wait for the convoy leaders to return before another convoy is sent The records also show that the work of the convoy leaders was not without blemish. Several complaints, some of a serious nature, were received and were dealt with by the management. In the circumstances, the company thought that as the work is of an intermittent and temporary nature and as it would not be possible to employ full-time workmen and as the convoy leaders were not reliable and trustworthy, the management took a decision to entrust the work to independent contracters

The question under what circumstances a company would be justified in resorting to contract system has been considered by the Supreme Court in two decisions, namely, *Standard Vacuum Refining Co* v *Their Workmen*[1], and *National Iron and Steel Co.* v *State of West Bengal*[2] In the former decision, the Supreme Court has held that industrial adjudication does not encourage the employment of contract labour in modern times and observed.

> " ...Whenever a dispute was raised by workmen in regard to the employment of contract labour by any employer it would be necessary for the tribunal to examine the merits of the dispute apart from the general considereation that contract labour should not be encouraged, and in a given case the decision should rest not merely on theoretical or abstract objections to contract labour but also on the terms and conditions on which contract labour was employed and the grievance made by the employees in respect thereof"

The dispute in question before the Supreme Court related to claiming maintenance work at the refinery of the Standard Vacuum Oil Company including the premises

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1 A I R. 1960 S C 948. 2 (1967) 2 L L J 23 A I R 1967 S C. 1206

and the plants The Supreme Court found that so far as the work is concerned it is incidental to the manufacturing process, and is necessary for it, and of a perennial nature which must be done everyday, and this work is done by workmen in the regular employ of the employer and there should be no difficulty in having regular workmen for this kind of work The Court proceeded to observe that the matter would be different if the work was of intermittent or temporary nature or was so little that it would not be possible to employ full time workmen for the purpose The nature of the work in the case decided by the Supreme Court is entirely different. The work was incidental to the manufacturing process and of a perennial nature and was done every day, and the work was done by workmen in the regular employ of the employer In this case, it is found that the work is intermittent and that the convoy leaders have to wait for three or six weeks for work depending upon the distance of the route, and during that period they are not paid The work was confined only to about ten to twelve days in a month, and was not perennial in nature. The delivery of the chassis at the destination of the buyer cannot be said to be incidental to the manufacturing process. It would not also be feasible to engage some convoy leaders on permanent basis or absorb some of them permanently, as the convoys will have to be moved without any delay. Applying the test laid down by the Supreme Court, as the work is intermittent, as it is not possible to employ the convoy leaders as full time workmen, the decision of the management to resort to contract system cannot be assailed In *National Iron and Steel Co* v. *State of West Benal* [1], the Supreme Court reiterated the principles laid down in *Standard Vacuum Refining Co* v *Their Workmen*[2], holding that the Industrial Tribunal can direct the abolition of the contract system, if the facts justified It may be noted that in the case cited, the Tribunal directed abolition of the system of contract labour excepting for the purpose of loading, unloading and for removing slags, ashes, burnt sand, etc. and waste products It will be seen that contract labour for certain purposes was accepted by the Industrial Tribunal Applying the test laid down by the Supreme Court in the *Standard Vaccuum Refining Co., case*[2] referred to I agree with the Industrial Tribunal that the decision of the management to resort to contract system cannot be assailed According to the terms of the reference of the Government, the first part of the reference, *viz.*, whether the demand of the workmen for the abolition of the contract system in the sphere of chassis delivery work, is justified, will have to be answered against the workmen

The second part of the reference is whether the demand of the workmen for the absorption of the convoy leaders as regular workers is justified, and if so, to what relief they would be entitled to As the contract system is held to be valid, the sixty-two convoy leaders drivers cannot be absorbed as regular workers, and this question will also have to be answered against the workmen The question of relief is consequential. As the second part of the reference is answered in the negative, the workers will not be entitled to any relief

Mr Dholia on behalf of the petitioners submitted that the convoy leaders should be treated as workmen under sections 2 (*s*) of the Industrial Disputes Act, 1947, and even on its finding that to resort to contract system is valid, the Tribunal should have given other reliefs such as retrenchment compensation, etc As no proper retrenchment notice has been given, the learned Counsel submitted that the workmen should be deemed to continue in service Under section 10 (4) of the Act, it is the duty of the Tribunal to confine its adjudication to the points referred to it for adjudication and matters incidental thereto The terms of reference did not include the determination by the Tribunal as to whether there was any retrenchment and if there was any retrenchment, whether proper retrenchment notice was given. These questions cannot be said to be incidental to the points of dispute referred for adjudication. The questions raised by Mr Dholia can only be gone into in a separate reference It is open to the workmen to ask for a separate refer-

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1 (1967) 2 L L J 23 A.I R. 1967 S.C. 1206. 2. A I.R 1960 S C. 948.

rence on these matters and the management would be entitled to raise all defences that are open to them In the result, the Writ Petitions are dismissed. There will be no order as to costs.

V.K. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT:—MR JUSTICE T. VENKATADRI.

Subbammal .. *Petitioner**

v.

The State of Madras represented by the Secretary, Home Department, Fort St George, Madras, and another .. *Respondents.*

Land Acquisition Act (I of 1894), *section* 6—*Acquisition of land for providing quarters to* Koravars—*Government not contributing even a pie towards compensation payable to land-owner—Proceedings void.*

Where the Government sought to acquire an extent of land to provide quarters to seven *Koravars*, on applications filed by them, but did not contribute even a proverbial pie towards the compensation payable to the owner of the land from out of the public revenues, the entire amount having been paid by the *Koravars* themselves, it would be a colourable exercise of power and the whole proceedings would be void.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the land acquisition proceedings in respect of portion of land (58 cents) in Survey No 36/2 Kangaranandal Village, Polur Taluk, North Arcot District, including (*i*) Memo No 85479-H W. IV 63-2 Home, dated 27th July, 1963 II I No 4289 of 1963, (*ii*) G.O.R. No. 3888, Home, 27th September, 1963, II I No. 5982 of 1963 and (*iii*) R.C.A. No. 2160/63 on the file of the Special Tahsildar, Land Acquisition, Harijan Welfare, Polur, North Arcot district and quash the entire proceedings.

V. Vedantachari for *T. L. Nagaraja Rao*, for Petitioner.

The Assistant Government Pleader, for Respondents.

The Court made the following

ORDER.—An interesting question of law arises in this Writ Petition namely whether the Land Acquisition proceedings in respect of S. No 36/2 in Kangaranandal Village, Polur Taluk, become void on the simple ground that the Government did not contribute even a proverbial pie in order to pay compensation from and out of the public revenues as declared in their declaration under section 6, dated 20th November, 1963

The petitioner possessed two small properties, namely, 74 cents of wet land in S. No. 149/2 and 1 74 acres of dry land in S No 36/2. The Government sought to acquire an extent of 50 cents of land from and out of S No. 36/2 to provide quarters to seven *Koravars*, on applications filed by them to acquire these lands for their residential purposes and they undertook to pay the entire compensation in respect of the lands sought to be acquired Accordingly the seven *Koravars* deposited into the Treasury a sum of Rs 630 83 on 1st June, 1963 at the rate of Rs 87 69 The Government notified under section 4 (1) of the Land Acquisition Act and on 20th November, 1963, they issued the declaration On 3rd April, 1964 the *Koravars* deposited the balance of the amount towards the compensation and the awards as pronounced on 31st July, 1964 The petitioner, as stated previously, by me wants to quash the whole proceedings on the simple ground that the Government

* W P. No. 2376 o 1965. 8th January, 1968.

has not contributed even a single pie towards the compensation payable from the public revenues. It is manifestly clear that the Government has not contributed even a single pie towards the compensation amount except, by the Government Order dated 27th September, 1963, merely declaring that the entire costs of the acquisition will be borne by the Government. Factually, the Government did not contribute any amount towards the compensation amount. On the other hand it is perfectly clear that the *Koravars* paid the entire amount of compensation towards the land to be acquired by the Government. Evidently it is worthwhile to refer to a case in *Ponnaia* v *Secretary of State for India*[1], where the learned Judges held as follows :

> " We think that the Legislature, when they passed the Land Acquisition Act, did not intend that owners should be deprived of their ownership by a mere device of private persons employing the Act for private ends or for the gratification of private spite or malice."

In a similar situation, Rajagopalan, J., observed in *Syed Dilawar* v. *Collector of Madras*[2] that the letters written by the Director of Harijan Welfare to the Government and to the tenants indicate that the tenants were to meet the entire cost and these correspondence do not indicate that any portion of the cost of acquisition, even one anna, was to be paid by the Government out of public revenues, and therefore, the declaration issued by the Government under section 6 (1) had to be set aside as one made without jurisdiction. In the present case, I feel that the Government sought to acquire this property only to benefit these seven *Koravars*. Since the procedure as to the acquisition of lands has not been followed strictly and since it is a colourable exercise of power, I feel that the whole proceedings should be quashed. Therefore the proceedings initiated by the Government in respect of S. N. 36/2 is quashed.

The writ petition is allowed, but there will be no order as to costs.

V.K. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

K. Dakshinamoorthy .. *Petitioner**

v.

The District Signal Tele-Communication Engineer (Works), Perambur, Madras, and another .. *Respondents.*

Railway servants—Conduct and Discipline Rules for Railway Subordinates, rule 1712 (2) *—Interpretation—Absence of unwillingness on the part of defence helper to assist the delinquent Railway subordinate at departmental enquiry—Holding of summary enquiry by the Enquirying Officer without enabling the defence helper to appear for the delinquent officer—Enquiry, if suffers from material defect.*

Railway Protection Force Act (*XXIII of* 1967), *section* 13*—Searches under—If should be followed in cases of search relating to ordinary administrative security of Railway workshop premises.*

Sub-rule (2) of rule 1712 of the Conduct and Discipline Rules for Railway subordinates *inter alia* provided that the accused railway servant may presen his case with the assistance of any other railway servant employed on the same railway (including a railway servant on leave preparatory to retirement) on which he is working, subject to the approval of the Inquiring Authority.

The more proper way to interpret this rule, is to hold that the right to have another person's services to assist a delinquent railway subordinate at a depart-

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1. (1926) 51 M.L.J. 338.
2. (1955) 1 M.L.J. 306 : (1955) M.W.N. 285.

* W.P. No. 2866 of 1965. 31st January, 1968.

mental enquiry is a valuable right and it is this valuable right that has been recognised in rule 1712

In the present case, the Enquiring Officer was prepared to concede at the earlier stages the several requests which the petitioner made, in the first place, for the services of the defence helper, namely, Dorairaj and then conceded to his request for giving up Dorairaj and obtain the services of another defence helper Having decided to grant the privilege, it was incumbent on the Enquiring Officer to afford to the delinquent officer reasonable facilities for access to the defence helper's services When the departmental head under whom *K* was employed intimated to the petitioner and consequently also to the Enquiring Officer that *K*'s services could not be spared 'tomorrow' and further that his services could not be spared for the succeeding week, it is clear that the incapacity which prevented *K* from attending, was purely temporary and was not due to unwillingness on the part of *K* to help the petitioner as defence helper at the enquiry. The Enquiring Officer had, therefore, a clear duty in such a case to give reasonable opportunity for *K*'s services being made available to the petitioner for his defence, without proceeding summarily with the enquiry on 16th, 17th and 28th October, 1964 and without giving a reasonable time for *K* to appear and take up the petitioner's defence, especially in view of the specific reply of the head of the department where *K* was employed that some temporary reason prevented *K*'s appearance on the dates in question Therefore, the enquiry held on 16th, 17th and 28th October, suffered from material defect that the protection afforded to the delinquent officer under rule 1712 of the services of a departmental helper has been withheld from him for inadequate reasons

Held also that, it is unnecessary to import to such searches which are made as part of the ordinary administrative security of the Railway workshop premises, the principles laid down in the Railway Protection Force Act, 1957 and the Rules framed thereunder which are designed for an entirely different purpose, namely, to enable such Force to perform their duties under the Act and the Rules as an adjunct to the Police Force of the country.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the penalty advice No. ES/P/60 dated 17th December, 1964 on the file of the first respondent—the District Signal Tele-Communication Engineer (Works) Perambut, Madras—and the Order No. P. (A) 92/A/24 dated 11th June, 1965, on the file of the Assistant Personnel Officer/D and A, Headquarters, Personnel Branch, Southern Railway, Madras-3 and quash the said orders and made therein.

P. Anantan Nair, for *P N George* and *P Shanta Bai*, for Petitioner

S. K L Ratan, for Respondents

The Court made the following

ORDER —The petitioner, K Dakshinamoorthy was employed as a Khalas in the Signal and Tele-Communication Shop in the Southern Railway He was drawing a pay of Rs 72 at the time when the Railway authorities dismissed him from the service for serious misconduct by an order passed on 17th December, 1964 Before passing the order of dismissal, a charge was framed against the petitioner for the following misconduct·

"When you were passing through S & T Workshop Time Officer counter at about 11-38 hours on 14th July, 1964, your body and waist were searched by the RPF staff at the gate and during the search you were found keeping your left-hand pressed tightly with your body This aroused suspicion and you were asked to lift you left hand While lifting your left hand a small paper bundle

fell down from your left arm pit. In the bundle 8 bolts with nuts and 10 washers were concealed "

He was kept under suspension pending enquiry The charge was held proved and he was dismissed by the District Signal and Tele-communication Engineer (Works), Perambur, Madras (the first respondent) The appeal filed to the higher appellate authority was dismissed and the petitioner has filed this writ petition under Article 226 of the Constitution for the issue of a writ of *certiorari*

Two points were urged by the learned Counsel for the petitioner at the time of the hearing of the writ petition, in support of the petitioner's prayer. One is that at the time when the alleged search mentioned in the charge was made by the Railway Protection Force Staff at the gate, there was an obligation on the part of the searching personnel to comply with the requirements of section 13 of the Railway Protection Force Act, 1957 as well as rule 18 of the Rules framed under the Railway Protection Force Act on 10th September, 1959 The second argument relied upon by the petitioner's learned Counsel is that the requirements of the Conduct and Discipline Rules, in particular, rule 1712, which permits a Railway servant accused of a departmental irregularity to have the help of another Railway servant to defend him had not been complied with in this case and to that extent, the enquiry has been vitiated

Taking up the first point, section 13 of the Act mentioned above gives power to search without warrant to senior officers of the Railway Protection Force including a Senior Rakshak and this power is similar to the power conferred on Officers-in-charge of Police Stations in the Criminal Procedure Code Section 13 (2) provides that the provisions of the Code of Criminal Procedure, relating to searches under that Code shall, so far as may be, apply to searches under this section Rule 18 of the Railway Protection Rules states :

" Whenever a search of a person or his belonging is conducted under section 13 of the Act, an inventory shall be prepared in the presence of two respectable witnesses and a copy of the inventory shall be given to the person concerned and if any property suspected to be stolen is found on such search it shall also be sent to the police along with the person "

The learned Counsel appearing for the Railway urges that these provisions found in the Act and the Rules were intended to enable the Railway Protection Force to discharge its policing and protective duties, and in the discharge of those duties, the Railway Protection Force functions as a limb of the police force in the State. Thus, when the power to arrest a person conferred under section 13 has been exercised under the Act, the person making the arrest is required to make over the person arrested to a police officer. A similar provision is found in rule 17 of the Rules Rule 18 relating to the provision for search also provides that when any property is seized in the course of a search, it shall also be sent to the police along with the person searched It is, therefore, clear that these provisions are intended to enable the Railway Protection Force to discharge their duties which are of a statutory nature wherein they function as an adjunct to the normal police force of the country What we have in this case is not a search followed by investigation into an offence to be dealt with later on by the police under the criminal law The search was conducted in the course of administrative duties, namely, keeping a watch on the employees who leave the workshop gate As part of the normal administrative duties of those in charge of the workshop, will be to ensure that the employees leave the premises without concealing any of the properties of the workshop on their person This kind of check on employees leaving the workshop, is conducted by every private employer in charge of workshops for safeguarding their own property It was in the course of a search conducted in that connection, that according to the charge framed against the petitioner, certain railway property was found in his possession It will be unnecessary to import to such searches which are made as part of the ordinary administrative security of the Railway workshop premises the principles laid down in the Railway Protec-

tion Force Act and the Rules framed thereunder which are designed for an entirely different purpose, namely, to enable the Railway Protection Force to perform their statutory duties, under the Act and the Rules as an adjunct to the police force of the country. I am of the opinion that this attack on the procedure is without substance.

However, on the second point mentioned above, there appears to be a genuine case for reopening the enquiry. Rule 1712 of the Conduct and Discipline Rules for Railway Subordinates is the relevant rule which arises for consideration. It deals with the procedure for enquiry when a major penalty is proposed to be inflicted on a railway servant. Rule 1712, sub-rule (2) states :

> " The accused railway servant may present his case with the assistance of any other railway servant employed on the same railway (including a railway servant on leave preparatory to retirement) on which he is working, subject to the approval of the Inquiring Authority."

The counter-affidavit of the Railway in this case gives an account of what happened at the time of the enquiry and with particular reference to rule 1712 relating to the facilities to be given to a railway servant for help by another railway servant when he is proceeded against for a major misconduct. In the beginning on 15th August, 1964, the petitioner wanted that one P.S. Dorairaj, Machanic Fitter should be permitted to defend him. Necessary permission was granted by the Enquiring Officer, and Dorairaj appeared at the earlier stages and took copies of the documents on behalf of the petitioner. On 21st September, 1964, the petitioner expressed his desire that some other defence helper should be permitted to assist him. The Enquiring Officer did not turn down his request or insist that Dorairaj alone should continue to help the petitioner. He adjourned the enquiry, so that the petitioner could furnish the name, designation and the particulars of the new defence helper. The enquiry was adjourned to 6th October, 1964, when the petitioner asked for further time presumably to get the particulars about the new defence helper. The enquiry was adjourned from 6th October, 1964 to 16th and 17th October, 1964. In the interval on 9th October, 1964, the petitioner nominated one Kolandaivelu, another Railway employee and wanted the enquiry proposed to be held on the 16th and 17th to be adjourned to some other date after 20th October, 1964 to enable the petitioner to arrange for the attendance of Kolandaivelu. This should have been treated as a reasonable request, and the enquiry officer ought to have adjourned the enquiry in order to enable the new defence helper to be present and assist the petitioner. But unfortunately, the enquiry was held on 16th October, 1964 without the presence of the defence helper and some witnesses were also examined for the Railway. On 17th October, 1964, the enquiry was adjourned to 28th October, 1964 and the petitioner was told that on 28th October, 1964 the enquiry would proceed *ex parte* if he failed to attend. What happened in the interval between 17th October, 1964 and 28th October, 1964 is made clear from the following circumstances mentioned by the petitioner's learned Counsel. On 17th October, 1964, the petitioner was supplied with a copy of a letter from the Head of the Department where Kolandaivelu was employed stating that it was regretted that it was not possible to spare the services of Kolandaivelu, Clerk of this office ' tomorrow '. There was another communication dated 27th October, 1964 from the same Head of the Department where Kolandaivelu was employed, stating ' it is regretted that the services of Kolandaivelu could not be spared during this week ' These communications would show that for some reason not disclosed, Kolandaivelu was not in a position to assist the petitioner for the hearing on 17th October, 1964 and also for the whole of the week before and after 28th October, 1964. The learned Counsel for the Railway urges that in such a situation, the Railway is not bound to give further time to enable the helper to be relieved from his ordinary work to assist the delinquent officer at the enquiry, that the question of relieving the helper is entirely discretionary, and subject to the exigencies of the service, and that the delinquent officer should take the risk of the helper's services not being made available for some reason

or other. In other words, that the learned Counsel wants to represent is that the right to have the services of a helper is not an absolute right, but must be subject to the discretion of the Enquiring Officer and also the availability of the services of the defence helper which again will depend upon several other factors. The learned Counsel for the Railway urges in the above circumstances is that in the present case, even though the Head of the Department where Kolandaivelu was employed was not in a position to relieve him on 17th October, 1964 and in the week before and after 28th October, 1964, the enquiry conducted on the 16th, 17th and 28th October 1964 would be a proper enquiry and that it was not open to the petitioner to contend that that enquiry should be reopened to enable him to have the services of a helper. The counter-affidavit itself shows, that some witnesses were examined on 28th October, 1964 and at the conclusion of the enquiry, the petitioner made an endorsement as follows :—

> " I, the undersigned Dakshinamoorthy, Khalasi T. No. 37 beg to say that I had no defence helper to assist at the enquiry. On account of this, I was not able to question the witnesses on the prosecution side and I feel that it will be possible to accuse me in this case. Without defence helper, I feel that my case has become weak."

It is not possible to say categorically that the right to have a defence helper's services to assist a delinquent officer under rule 1712 is an absolute right. Equally it is not possible to assert that the right to afford the defence helper's services to a delinquent officer granted under rule 1712 is wholly discretionary, and that the Enquiring Authority can give permission or refuse permission for a helper's services at his discretion. The more proper way to interpret this rule, is to hold that the right to have another person's services to assist a delinquent Railway subordinate at a departmental enquiry is a valuable right and it is this valuable right that has been recognised in rule 1712 If in any particular case that right has been withheld this Court would be entitled to examine at the instance of the aggrieved subordinate whether that right has been withheld for valid reasons or not. In the present case the Enquiring Officer was prepared to concede at the earlier stages the several requests of the petitioner made in the first place, for the services of the defence helper namely Dorairaj and then conceded to his request for giving up Dorairaj and obtaining the services of another defence helper. There is no question, therefore, of the Enquiring Authority deciding in this case to withhold the privilege under rule 1712. Having decided to grant the privilege, it was incumbent on the Enquiring Officer to afford to the delinquent officer reasonable facilities for access to the defence helper's services. When the departmental head under whom Kolandaivelu was employed intimated to the petitioner and consequently also to the Enquiring Officer that Kolandaivelu's services could not be spared 'tomorrow' and further that his services could not be spared for the succeeding week, it is clear that the incapacity which prevented Kolandaivelu from attending, was purely temporary and was not due to unwillingness on the part of Kolandaivelu to help the petitioner as defence helper at the enquiry. The Enquiring Officer had, therefore, a clear duty in such a case to give a reasonable opportunity for Kolandaivelu's services being made available to the petitioner for his defence, without proceeding summarily with the enquiry on the 16th, 17th, and 28th October, 1964 and without giving a reasonable time for Kolandaivelu to appear and take up the petitioner's defence, especially in view of the specific reply of the Head of the Department where Kalandaivelu was employed that some temporary reason prevented Kolandaivelu's appearance on the dates in question. I have, therefore, come to the conclusion that in the present case, the enquiry held on the 16th 17th and 28th October, suffers from the material defect that the protection afforded to the delinquent officer under rule 1712 of the services of a departmental helper has been withheld from him for inadequate reasons

Therefore, I allow the writ petition and set aside the order removing the petitioner from the service. It will be open to the Railway Authorities to proceed with the part of the enquiry from 16th October, onwards after affordeing a reasonable

chance to the petitioner to have the services of a departmental helper, whether it be Kolandaivelu or in view of the passage of time, some other subordinate of the Railway way, as the petitioner may elect

The writ petition is allowed as above No order as to costs

V.M.K. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE K VEERASWAMI AND MR JUSTICE N. KRISHNASWAMY REDDY

The State of Madras, represented by the Collector, Kanyakumari District, Nagercoil . *Appellant**

v.

Raman Pillai and others . *Respondents.*

Land Acquisition Regulation (Travancore Regulation XI of 1089 *M E), sections* 18 *and* 24 (2)—*Scope—Who can ask for reference under section* 18—*Property acquired in the possession of mortgagees after partition—Reference at the instance of one of them who had not filed objections before the Land Acquisition Officer—Competency—Claim of others —If can be considered in sucha reference.*

Sub-section (1) of section 18 by itself would suggest that it is only a person interested within the meaning of the Act who has filed objections after the award who could ask for a reference. But this sub-section will have to be read subject to the provisions of section 24 If the omission to make object on before the Collector is for sufficient reasons, then section 18 (1) read with section 24 would imply that such a person would be entitled to ask for a reference.

In the present case, the reason why the first respondent did not himself prefer any objection before the Land Acquisition Officer would seem to be that he was one of the usufructuary mortgagees and that what applied to one of them would extend to the rest as well, because the security in their favour is one and indivisible That was a sufficient reason for the first respondent preferring no objection and as respondents 2 and 3, his co-mortgagees, had filed objections, the ground based on section 24 as to the non-maintainability of the reference at the instance of the first respondent cannot be upheld.

Nor has the contention any force that inasmuch as a reference was sasked for only by the first respondent the claim of respondents 2 and 3 should not be considered under the reference Though the mortgagees purported to divide the hypotheca and assumed possession of the relative shares, it exists as a mortgage and has to be redeemed not in dribblets but as a whole The position is comparable in a sense to property owned in co-ownership without a division, in which case any one of the co-owners can represent the whole of what is owned to co-owner-ship Just as one of the mortgagees alone cannot insist on redemption of the share allotted to him at the partition, on the same principle, one cannot restrict one of the mortgagees for purposes of sections 18 and 24 to his assumed interest alone.

Section 24 restricts the claimant to the compensation claimed by him The Court cannot award more than what is claimed

Appeal against the Order of the District Court of Kanyakumari at Nagercoil in M C. No 4 of 1960 (L A C No 235 of 1956 of the Revenue Divisional Officer, Padmanabhapuram)

The Additional Government Pleader and *K Gopalaswami*, for Appellant

T. S Srinivasan, for Respondents

* Appeal No 582 of 1961 24th November, 1966

The Judgment of the Court was delivered by

Veeraswami, J.—This appeal arises out of a reference under section 18 of the Land Acquisition Regulation (XI of 1089-M E) That was a reference at the instance of the first respondent The land acquired is comprised in S.No. 1111 in Ponmanai village, Kalkulam Taluk, and the purpose of the acquisition was to provide land for the Kulasekharam High School. The crucial date for purposes of determining the market value under the provisions of the said Regulation is the date of the declaration under section 6, which is 6th April, 1954 The property belonged to the fifth respondent who mortgaged the same usufructuarily in favour of respondents 1 to 3 and 6. The mortgagees apparently for purposes of convenient enjoyment by a deed of partition dated 1st June, 1951, divided the hypotheca *inter se* and as a result, the second respondent was allotted a fourth share the third and the first one-half and a fourth share respectively Before the Land Acquisition Officer the claim was at the rate of Rs 7,000 per acre But the award was only at Rs 700 per acre It appears that only the second and third respondents responded to the notice under section 9 and filed objections making a claim at the rate we mentioned. Nevertheless, after the award, the first respondent alone applied under section 18 for a reference In that reference, the other respondents were made parties. The Court below appointed a Commissioner and mainly on the basis of his report fixed the market value at Rs 5,000 per acre. The State has preferred this appeal

Certain legal contentions on behalf of the appellant are addressed to us The first of them is that the first respondent, having not responded to the notice before the Land Acquisition Officer, was not entitled to ask for a reference under section 18. In support of this contention our attention is invited to section 24 and the terms of section 18 of the Travancore Regulation Section 24 (2) no doubt says that when the applicant has omitted without sufficient reason to be allowed by the Judge to make a claim before the Land Acquisition Officer, the amount awarded by the Court shall in no case exceed the amount awarded by the Collector But the following sub-section gives discretion to the Court if the omission in its opinion, is for sufficient reason to award to the applicant an amount in excess of what had been awarded by the Land Acquisition Officer Sub-section (1) of section 18 by itself would suggest that it is only a person interested within the meaning of the Act who has filed objections before the Land Acquisition Officer and felt affected by such objections after the award who could ask for a reference But in our opinion, this sub-section will have to be read subject to the provisions of section 24. If the omission to make objection before the Collector is for sufficient reasons, then section 18 (1) read with section 24 would imply that such a person would be entitled to ask for a reference. In this case, the reason why the first respondent did not himself prefer any objection before the Land Acquisition Officer would seem to be that he was one of the mortgagees and that what applied to one of them would extend to the rest as well, because the security in their favour is one and indivisible As we consider that this was a sufficient reason for the first respondent preferring no objection, and as respondents 2 and 3 interested in the security had filed objections, the ground based on section 24 as to the non-maintainability of the reference at the instance of the first respondent cannot be upheld

It is next contended for the State that inasmuch as a reference was asked for only by the first respondent, the higher claim of respondents 2 and 3 should not be considered under the reference In principle and in the abstract, the contention may be well-founded, and it is supported by the decisions in *State* v *Narayani Pillay*[1], and *Rajamannai* v *State of Madras*[2], In the second case Ramakrishnan, J , held that it would not be permissible to take into account at the enquiry by the civil Court on a reference the representations of persons who have never applied after the passing of the award within the time-limit fixed by the statute stating whether

1 A I R 1959 Ker 136 2 (1965) 1 M L J 598

they accepted the award or were objecting to it The learned Judge went further and was of the view that such persons could not be added as parties to the reference made at the instance of persons who did not accept the award of the Collector. The provisions the learned Judge was construing in the Land Acquisition Act, 1894 are *in pari materia* with the Travancore Regulation. To the facts in that case, the principle pointed out by the learned Judge, which we with respect accept is correct was applicable But here as we already mentioned, the fcts are peculiar Though the mortgagees purported to divide the hypotheca and assumed possession of the relative shares, the hypotheca itself as security is one and entire and cannot be split up It exists as a mortgage and has to be redeemed not in dribblets but as a whole notwithstanding the fact that the mortgagees divided the hypotheca between themselves. In fact, it is recognised by the terms of the partition deed itself and it is stipulated there that at the time of redemption all the mortgagees should surrender possession to the mortgagor. That being the case, the position is comparable in a sense to property owned in co-ownership without a division, in which case any one of the co-owners can represent the whole of what is owned to co-ownership. Just as one of the mortgagees alone cannot insist on redemption of the share allotted to him at the partition, on the same principle, one cannot restrict one of the mortgagees for purposes of sections 18 and 24 to his assumed interest alone in the mortgage When one of the mortgagees makes an objection, necessarily it must extend to the entirety of the mortgage which as we said, is one whole and not capable in law of being split up. The mortgagees have interest in the security as a whole whatever may be the effect of the partition among themselves for the purposes of convenient enjoyment. On that view, we consider that the second objection also should fail.

There is a third ground urged by learned Additional Government Pleader which is that whereas the claim made by the mortgagees for the trees was limited to Rs. 2,000, the Court below enhanced it to Rs 2,405-55. We think that the contention is right. This is manifest from the terms of section 24, which restricts the claimant to the compensation claimed by him

It is urged finally for the appellant that the market value fixed by the Court below is excessive. As we mentioned, the Court below was mainly guided by the Commissioner's report But we do not think that this alone could justify the enhancement to the extent allowed by the Court below There were a number of data sales available to the Court below for consideration Of them, no doubt, the sale dated 24th April, 1954 worked out a rate of Rs. 5,700 per acre. But not only this was subsequent to the date of the declaration but also it was a conveyance of only a small extent of 7 cents Further the land was comprised in S No. 1106, which is bounded on one side by a road. Apparently, this was a more valuable land. It is needless to say that small plots of land do fetch higher prices than large extents Another sale deed dated 20th April, 1956, covered S. No. 1110 adjacent to the land under acquisition This also was a conveyance of only 6 cents but at the rate of Rs 4,000 per acre. Still later on 1st June, 1957, there was a sale of 22 cents of land in S No 1110 But this was at the rate of Rs 6,800 per acre Though these sale deeds were subsequent to the date of the declaration, they do in the absence of other data, give an indication as to the price to be fixed for the land under acquisition as on 1st April, 1954. Taking all the facts and circumstances into account, we think that the market value may reasonably be fixed at Rs. 3,500 per acre. The claimants will be paid compensation on that basis.

The appeal is allowed both in respect of the enhancement made by the Court below in respect of the trees in excess of Rs. 2,000 and in respect of the market value which we have fixed at Rs 3,500 per acre The appellant will be entitled to proportionate costs

V.K. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Chief Justice* AND MR JUSTICE M. NATESAN.

The Union of India represented by the Regional Director (Food) Southern Region, Madras .. *Appellant**

v.

Messrs. Ralli Brothers Ltd., represented by Agents, Messrs Best and Company (P.) Ltd., Madras and others *Respondents.*

Madras Fort Trust Act (II of 1905), section 39 (3)—Responsibility of the carrier (ship-owner) for short delivery—If ceases by the technical discharge of goods from the ship to the Port Trust—Port Trust not the agent of the consignee—Meaning of "disponent owners"

The Union of India instituted the suit (originally against four defendants) claiming a certain sum on account of loss and damage in respect of a consignment of refined sugar loaded at the Port of London and deliverable at the Port of Madras The plaint stated 'the first defendant in the suit are the 'disponent owners and carriers of the steamer S S. 'Indore,' the second defendant the agent of the first defendant, the third defendant the charterers and the fourth defendant, the agents of the charterers.

The owners of the vessel (fifth defendant) referred to the tally-sheet receipt under section 39 (3) of the Madras Port Trust Act and pleaded that the entire manifest quantity of sugar bags had been landed by the ship and taken delivery of by the Port Trust and if there had been any short delivery to the plaintiff by the Port Trust of Madras, the plaintiff must look to the Port Trust, Madras.

The main question for determination was on whom was the liability for the damages.

Held, that the responsibility of the carrier for the goods does not cease merely by the technical discharge of the goods from the ship but continues up to their delivery in accordance with the terms of the bill of lading. (*The Trustees of the Port of Madras by its Chairman* v *K. P. V Shaik Mohamed Rowther & Co*, (1963) 2 S.C.R. (Supp) 915, followed) The Port Trust is not the agent of the consignee.

Held, also that the expression "disponent owners" on which much emphasis had been laid by the parties, has not received adequate consideration Here is a technical word relating to Maritime law and it appears to have acquired a special meaning Whether the original charter is by demise or not, cannot (in this case) be inferred just by a construction of that charter Therefore, in fairness to the parties and in the interests of justice, it is necessary that an opportunity should be given to clear up this part of the case The entire case has to be remanded back for fresh disposal on the merits

On appeal under clause 15 of the Letters Patent and Order 36, rule 1 of the Original Side Rules from the judgment and decree of the Honourable Mr. Justice Ganapatia Pillai dated 30th March, 1961 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C S No 97 of 1956

The Government Pleader and *C. Rangaswamy Ayyangar*, for Appellant.

King and Partridge, for Respondents 1 and 2.

Pais Lobo and *Alwares*, for Respondents 3 and 4.

The Judgment of the Court was delivered by

Natesan, J—This is an appeal from the judgment and decree of this Court under its Original Jurisdiction dismissing the suit, C S No 97 of 1956 The Union

*O S A No 64 of 1961 30th June, 1967.

of India instituted the suit, originally against four defendants, claiming a sum of Rs. 66,491-11-5 on account of loss and damage in respect of a consignment of British refined Granulated Sugar consisting of 90,799 bags, each bag weighing two cwt., the total weight being T. 9,097-18-0-0 loaded at the Port of London and deliverable at the Port of Madras, J V Drake & Company the third defendant were the shippers and the Maritime Shipping and Trading Company Limited the owners of the ship, the S. S 'Indore' which carried the cargo. The first defendant in the suit chartered the ship on the 4th April, 1955 (Exhibit D-1) is the charter party) specifically for a full complete cargo of refined sugar in bags not exceeding 9,450 long tons net nor less than 9,000 long tons net for carriage to Madras. On the very day the third defendant in the suit, the shippers, sub-chartered the ship for the carriage of the sugar. The goods were taken aboard at London on 22nd September, 1955, Exhibit D-3 being the relative bill of lading The ship arrived at Madras on 19th October, 1955 and it commenced to discharge the cargo on 27th October, 1955 and the discharge of the cargo was completed, it is stated, on 8th November, 1955 According to the plaintiff, there was shortlanding of 414 bags of sugar weighing T. 41-8-0-0 as per bill of lading The plaintiff also complained that 6,807 bags were discharged in a bad, slack, cut and torn condition and 747 bags of sugar were sweat-stained and damaged making the sugar unfit for use. The shortage in the weight in respect of the slack, cut and torn and sweat-stained bags was estimated at T. 86-13-3-4. There was a survey with reference to the 7,554 bags in slack, cut and torn condition or sweat-stained and as against this it was stated, there were available 420 bags of ship-sweepings and 521 bags of shed-sweepings giving a weight of T 76-12-2-25. In the plaint as framed the claim is laid against the first defendant as "disponent owners" and carriers of the steamer. The second defendant-company was impleaded as the agents of the first defendant The third defendant-company was impleaded as charterers and the fourth defendant as the agents of the third defendant The first defendant, who are a company incorporated in England, in their written statement denied that they were 'disponent owners' or carriers of the steamer and referred to the Maritime Shipping and Trading Company Limited, London, as the owners of the vessel, S. S. 'Indore' from whom the first defendant chartered the ship under charter party dated 4th April, 1955. It was pleaded that the charter referred to was only a voyage charter and not a charter by demise and that the charterers had no control or possession of the vessel and the Master and the crew of the vessel were the servants and agents of the owners of the vessel The first defendant referred to the sub-charter entered into with the shippers the third defendant on identical terms and pointed out that the bill of lading was signed by the Master of the vessel as the agent of the owners thereof While, thus denying all liability for the loss and damage, on the merits also there was traverse of the allegation that the consignment of tons 9,079-12-0-0 was received on board at London in good order and condition There was a denial of the charge of negligence and lack of due care and diligence in loading, handling, stowing, carrying, keeping or caring for the consignment and, as regards the short-landing, it was pointed out that the entire quantity had been landed at the Port of Madras It was stated that in fact, there was an additional 11 bags landed and if there was any short delivery the matter was one for settlement between the plaintiff and the Madras Port Trust The second defendant, the agents of the first defendant while adopting the written statement of the first defendant, in variance with the written statement of the first defendant referred to the first defendant as the disponent of the vessel It was pleaded that since the disponent owners of the vessel were parties to the suit, the second defendant cannot be held liable for the amount claimed by the plaintiff As may be expected, defendants 3 and 4, the sub-charteres and their agents pleaded that the plaint disclosed no cause of action against them The written statement of the first defendant is dated 19th July, 1957. Long after on 24th September, 1958, Application No 2065 of 1958 was taken by the plaintiff for impleading the fifth defendant, the Maritime Shipping and Trading Company Limited, the actual owners of the ship, as party

fifth defendant in the suit In the affidavit in support of the application, it was reiterated that the first defendant in the suit are the 'disponent owners' and carriers of the steamer S S 'Indore', the second defendant being the agent of the first defendant, the third defendant being the charterers and the fourth defendant, the agents of the charterers The affidavit sets out negotiations between the parties for settlement of the claim and of the stay of the trial of suit pending the negotiations as the cause for delay in taking out the application To this application, without prejudice to the contentions that may be raised in the suit, the parties had no objection and as per order dated 6th August, 1955, the fifth defendant, as alleged owners of the steamer S S 'Indore' was made party defendants In the amended plaint, it was stated that the fifth defendant was made a party to the suit, as it was contended by the first defendant that it was the fifth defendant as the owners of the vessel that were liable for the suit claim

The owners of the vessel in their written statement, dated 9th June, 1960, while admitting their ownership of the vessel, denied that the first defendant were 'disponent owners' of the vessel They specifically referred to the tally-sheet receipt under section 39 (3) of the Madras Port Trust Act and pleaded that the entire manifest quantity of sugar bags had been landed by the ship and taken delivery of by the Port Trust and if there had been any short delivery to the plaintiff by the Port Trust of Madras, the plaintiff must look to the Port Trust, Madras.

On the pleadings, apart from quantum of damages, the main question for consideration was on whom was the liability for the damages With whom was the contract was the prime matter for discussion and the liability of the Port Trust, if any, had also to be ascertained There were as many as 21 issues in the suit and the learned Judge as against the fifth defendant, held that the institution of the plaint without obtaining leave under the Letters Patent could not be accepted as proper institution. It was, therefore, held that the Court had no jurisdiction as against the fifth defendant On the plea of limitation raised by the fifth defendant, it was held that the claim as against the fifth defendant was barred by limitation, the claim itself getting extinguished under rule 6 of Article III of the Carriage of Goods by the Sea Act The exoneration of the fifth defendant on these legal bars have not been the subject of any argument before us, and rightly, the position being clear The attempt before us has been to sustain the claim against the first defendant as the carrier or the 'disponent owners' of the vessel We shall be adverting to this aspect presently

On the merits while holding that 414 bags had not been delivered to the plaintiff by the Port Trust, the learned Judge was of the view that this was not a case of short landing as tally-sheets issued by the Port Trust showed the entire quantity of cargo as discharged The Assistant Traffic Manager of the Port Trust admitted that the entire quantity was landed and that the tally-sheets were correct The learned Judge proceeded on the view that the Port Trust by operation of law was made to accept the goods as bailee of the consignee, when it took charge of the goods from the ship and that the delivery of the goods to the Port Trust must be held to be delivery to the consignee In taking this view, the learned Judge purported to follow certain earlier decision of this Court Now this view of the jural position of the Port Trust cannot be maintained after the decision of the Supreme Court in *The Trustees of the Port of Madras by its Chairman* v *K P V Shaik Mohamed Rowther and Co* [1] The legal relationship between the ship-owner, the shipper or the consignor and the consignee is thus enunciated in the said decision

> "There is no doubt the ship-owner is the bailee of the shipper, the consignor, and that he is responsible for the delivery of the goods to the consignee or a transferee according to the terms of the bill of lading This duty the ship-owner discharges only when he has delivered the goods to the consignee or such

1 (1963) 2 S C R (Supp) 915

person who be entitled to take delivery in accordance with the endorsements on the bill of lading Delivery to the Board is not delivery to the consignee or person both because the delivery is to be on the presentation of the bill of lading and because the Act contains no provision which would constitute the Board an agent of the consignee for the purpose of taking delivery of the goods....... It is true that on the Board's taking charge of the goods and giving a receipt about it to the ship-owner, the master or the owner of the vessel is absolved from liability for any loss or damage which may occur to the goods which had been landed, but this provision by itself does not suffice to convert the receiving of the goods by the Board after they had been landed by the ship-owner to the Board's taking delivery of those goods on behalf of the consignee The Board simply takes charge of the goods on being required by the steamer-agent to take charge of it .. ..It is clear therefore that when the Board takes charge of the goods from the ship-owner, the ship-owner is the bailor and the Board is the bailee and the Board's responsibility for the goods thereafter is that of a bailee The Board does not get the goods from the consignee. ... ."

Lower down their Lordships pointed out:

"The responsibility of the carrier for the goods does not cease merely by the technical discharge of the goods from the ship but continues upto their delivery in accordance with the terms of the bill of lading"

In *The Madras Port Trust* v. *K P A T. Annamalai Nadar*[1], following the above decision of the Supreme Court, we have ourselves considered the relative positions of the ship-owner, the Port Trust and the consignee and the effect of the tally-sheet. It follows that the whole matter and the relative liabilities of the parties in this case will have to be examined afresh in the light of the above decisions The plaintiffs do not accept the correctness of the tally-sheets and question the finding that the entirety of the bags loaded have been discharged. Here we may remark that for reasons best known to themselves, the plaintiffs have not made the Port Trust as party-defendant and made any claim against the Port Trust The explanation submitted at the bar is that a claim, if any, available against the Port Trust was barred by limitation on the date of the suit.

Then there is the question of short weight of goods landed. Even if there is no actual short landing in the number of bags, the question of short weight of goods landed would arise for consideration and on this the learned Judge was of the view that the real shortage in weight could only be about 11 tons. The learned Judge was further of the view that the entire shortage in weight could not be attributed to the ship-owners, as the goods were lying in the warehouse of the Madras Port Trust for a considerable time before delivery was completed in March, 1956. The learned Judge, therefore, fixes the liability of the ship-owners for one half of the shortage in weighment The finding in this regard is attacked by the learned Counsel for the plaintiff It is pointed out that even if there has been no short-landing of 414 bags, there was shortage in the contents of the goods delivered covered by the 414 bags Assuming they had gone into the shed-sweeping or ship-sweepings, it is submitted that in calculating the loss in weight, the learned Judge has in effect given credit in favour of the defendants, of the weight of the goods twice. The learned Counsel points out that on a proper calculation on the tonnage actually delivered, the shortage would come on T 51-10 cwt. There is much to be said for this contention As we are remanding the matter for fresh disposal, we are not going into the details The learned Judge proceeds on the basis that there was no proof of the actual weight shipped The fact that the charterer the third defendant, is also the shipper, has some bearing on the question and has not been adverted to by the learned Judge The correspondence shows that there has been complaint of bad handling of the sugar bags during the discharge In the documents paper at page 84, there is a protest by the Assistant Director (Clearance and Storage)

1. (1967) 2 M L J 594 I L R (1966) 1 Mad 164

that the shore labourers were invariably using hooks while handling sugar bags ex S.S. 'Indore' despite repeated requests not to do so, and that considerable damage was caused to the bags by the use of the hooks A letter dated 3rd November, 1955, at page 92 of the documents points out that the Stevedore labour inside the hatches were discharging torn and slack bags without mending them with the result that a lot of sugar was lost during the movement of the bags from the hatches to the wharf. On the question of weight the learned Judge points out that the bill of lading while giving the number of bags and the total weight of the contents also contains the words "weight and contents unknown." The learned Judge would not give any weight to a certificate Exhibit P. 25 showing that each bag of sugar contained 2 cwts and further considers it not proved Learned Counsel for the plaintiff states that no objection was taken to the proof of this document and that it was not the case at trial that goods were not loaded as per invoice Now the bill of lading gives the number of bags shipped and about that number there can be no doubt. Clearly 414 bags have not been delivered to the consignee and having regard to the weight of the bags in torn or slack condition an inference may be drawn, if the other circumstances warrant that the bags not delivered whole and in proper condition contained contents similar in weight to those properly delivered. May be the learned Judge in the view he had taken on the legal issues has not referred to all the available evidence on the matter and the several aspects which do call for consideration, if the liability has to be definitely fixed True, some damage could have occurred in the premises of the Port Trust after landing A question will arise whether notwithstanding section 39 (3), the ship-owner or carrier could be made liable for the same We need not go into these questions now and here That there has been carelessness in the handling of the goods on board and after landing is apparent from the records. It is unfortunate that even formally the Port Trust has not been made a party to this suit and the claim against it has been allowed to get barred by limitation in endless correspondence. It may be that the Port Trust is a statutory Corporation, but that does not absolve it from liability for the loss if any for which it is answerable to the Union Government

It is contended for the plaintiff that even if other defendants are not liable, as the "disponent owners" of the vessel in relation to the charterer third defendant, the first defendant was in the position of the ship-owner and liable as carriers It is contended that only in respect of loss and damage, which may occur after the goods had been taken charge of by the Port Trust, the Port Trust may be proceeded against and that the records of discharge and delivery establish that 6,807 bags were discharged in a slack condition and 747 bags in torn condition. There were 420 bags, sweat-stained The total tonnage was in 90,799 bags and only 83, 831 bags it is stated were delivered in sound condition Before the learned Judge the plaintiff stated that they will not be pressing their claim for deterioration in quality in the case of sweat-stained sugar However, claim for damages were persisted in in respect of shed-sweepings because the shed-sweepings were an admixture of dirt and foreign matter in large measure

Though there is a specific issue No 11 on the question whether the first defendant are not "disponent owners" or carriers of goods, there is no discussion of this question in the judgment under consideration In the charterparty between the first defendant and the third defendant, the first defendant are referred to as the 'disponents' of the ship called S.S 'Indore'. The other terms of the charterer are practically identical with the terms of the charter in favour of the first defendant from the fifth defendant In both the charter parties one finds the following clauses:

> "Charterers' liability to cease when cargo is shipped and Bills of lading signed, except as regards payment of freight, dead freight and demurrage, if any"

In both the charter parties it is covenanted:

> "Ship to be responsible for any quantity short delivered of signed Bill of lading quantity."

Excepting the use of the word 'disponents' in the charter-party with regard to the third defendant, there is little difference in the covenants in the two charter-parties. This aspect of the matter is emphasised by both the parties. But 'disponent' or 'disponent owner' is not statutorily defined anywhere, nor was our attention drawn to any decided case or standard legal treatise, where the rights and liabilities of the disponent owner are set out. The reference to 'disponent' or "disponent owner" in Scrutton on Charter Parties does not give any lead in the matter for holding merely from the expression disponent found in the second charter-party, that the first defendant must be deemed to be the ship-owner for purposes of the voyage. Scrutton classifies charter parties under three main categories thus:

"(i) Charters by demise (ii) time charters (not by way of demise) and (iii) voyage charters. The last category is most commonly concerned with charters for a single voyage. . . . . Categories (ii) and (iii) however, both differ from category (i) in the important respect that the owner remains under them in possession of his ship with all the important legal consequences that flow therefrom."

There is a footnote that the modern tendency is against the construction of a charter as a demise or lease. At page 30 in Scrutton (17th Edition) it is observed that the description of a person in a charter-party as "charterer" or "disponent owner" is not inconsistent with his contracting as agent for another and therefore, the real principal may prove the agency and sue in his own name. In Carver on Carriage by Sea (Vol. 1), 11th Edition, the footnote in page 337, refers to the case of a chartering of a ship from "disponent owners" who were a company managing the ship for the owners. The report cited is not available. That the parties laid much stress on the expression "disponent owners" is apparent from the pleadings. While the plaintiff asserted the liability of the first defendant on the basis of his being the disponent owner and carrier of the steamer, the first defendant's understanding of the claim is apparent from his plea in para 4 of the written statement.

"The said charter-party (the one in favour of the first defendant from the fifth defendant) was only a voyage charter and not a charter by demise and therefore, the charterers had no control or possession of the vessel and the Master and the crew of the vessel were the servants and agents of the owners of the vessel. There is, therefore, no privity of contract between the plaintiff and this defendant. It is only in cases where the charter operates as a demise or a lease of the ship itself and the charterer for the time being becomes the owner of the vessel that the charterer can be considered to be a disponent owner. The charter in question was not a charter by demise, but was only a voyage charter as stated already."

It is not clear from this whether the first defendant understood that where the charterer is the disponent owner of the vessel the charter is a charter by demise. If it is a case of charter by demise of the ship then of course, the first defendant would be a carrier and liable as such.

"If the charter-party is such as to give the charterer possession of the vessel as well as the right to use her carrying capacity, so that the vessel is, in effect, let to him, and the master in charge of her is his servant, then the owner is not in the position of a carrier, either as regards the charterer or anyone else, and there is no reason for regarding the master as actually, or presumptively, his agent in contracting with shippers." (Carver—Carriage by Sea (Vol. 1), 11th Edn-page 408.)

As stated earlier the second defendant the agent of the first defendant would aver that the first defendant are 'disponent owners' of the vessel. The fifth defendant denies that the first defendant were 'the disponent owners' of the vessel and admits that he is the owner. We may state that before us the same Counsel represented defendants 1, 2 and 5 and his case is that the liability, if any, as shipowner is that of the fifth defendant and not of the first defendant. Learned Counsel for the defen-

dants would contend that a reference to the two charter-parties and how the respective rights and liabilities of the parties were understood as made out in the evidence, would show that the first defendant was merely an ordinary charterer, the third defendant being a sub-charterer. We feel that having regard to the pleadings and the emphasis laid by the parties on the expression " disponent owners " the matter has not received adequate consideration and cannot be properly disposed of now on the materials before us. Here is a technical word relating to Maritime law and it appears to have acquired a special meaning Whether the original charter is by demise or not, cannot in this case be inferred just by a construction of that charter. Having regard to the importance of the question, we do not think that justice would be done by by-passing the issue The questions raised in our view, in this case are of some importance As pointed out earlier, a specific issue was raised touching this aspect of the question, and Counsel on both sides feel that if an opportunity is given, they would be able to place adequate materials for a determination of the question. We think that in fairness to the parties and in the interests of justice, it is necessary that an opportunity should be given to clear up this part of the case. The plaintiff's whole case rests upon this plea and we do not think we would be justified in rejecting the claim on the simple ground that at the trial the plaintiff does not appear to have invited a specific decision on the question. *Ex facie* the parties attached considerable importance to the term The second charter-party does contain the expression that the first defendant was the disponent of the ship. We are not satisfied that merely on this description without anything more, we can as contended conclude that the first defendant is the carrier and shift, the liability from the fifth defendant to the first defendant On the other aspect of the question, regarding short-landing also, the learned Judge has proceeded on the erroneous basis that the Port Trust is the agent of the consignee We, therefore, think it is desirable that the entire case is remanded back for fresh disposal on the merits.

In the result, the judgment and decree dated 30th March, 1961 in C S No 97 of 1966 are set aside and the case is remanded for fresh disposal in the light of the observations contained herein The taxed costs of the suit as well as the costs of this appeal will abide the result and be provided for in the ultimate decree that may be passed In the appeal one set of fees for all the defendants 1 to 5 only is allowed. Court-fee paid on the memorandum of appeal will be refunded

V.M.K ——— *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE T. RAMAPRASADA RAO

Madras Cine Service by Sole Proprietor T S Lakshmi .. *Petitioner**

v

Shyamala Pictures Private Ltd by Managing Director AR M.AN. Annamalai Chettiar. .. *Respondents.*

Presidency Small Cause Courts Act (XV of 1882), section 38—New Trial Application—Powers of the Full Bench—Revisional and not appellate—No power to reverse findings of fact—Matter to be remitted to trial Court—Practice.

The plaintiff filed a suit for recovery of monies on the foot of an agreement executed by the defendant The trial Court accepting the plea of the defendant that the agreement was vitiated by undue influence and coercion and therefore unenforceable, dismissed the suit after making irreconcilable observations The new trial Bench reversed the decision of the trial Court and decreed the suit. On a revision to the High Court

Held Under section 38 of the Act the Full Bench has not jurisdiction to reverse findings of fact, as their jurisdiction is purely revisional and not appellate in character

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* C R P No 2240 of 1965 19th September, 1967.

Where the new trial Bench definitely is of the opinion that the findings of fact of the trial Court cannot be sustained, it can remit the matter to the trial Court for a reconsideration of the entire issue. It is possible that they can give their mind and indicate their views as well in the order of remittal. This is however left to the discretion of the bench trying the matter.

Petition under section 115 of Act V of 1908 praying the High Court to revise the decree of the Court of the Small Causes, (Full Bench), Madras, dated 13th August, 1965 and passed in N.T A. No. 62 of 1965 (S C S. No. 7594/63 on the file of the Court of Small Causes (Second Judge), Madras.

E. R. Krishnan, and *T. V. Sathiamurthy*, for Petitioner.

S. B. Mani, and *Palanidppan*, for Respondent.

The Court delivered the following

JUDGMENT.—The question involved in this civil revision petition is of some importance as it deals with the powers of the new trial Bench of the Court of Small Causes in Presidency towns under section 38 of the Presidency Small Cause Court Act, 1882, The relevant facts are as follows :

The respondent (plaintiff) instituted a suit for recovery of moneys, being the hire charges of a camera, on the foot of an agreement Exhibit P-1 executed by the petitioner (defendant) on 29th September, 1963. The plea of the petitioner was that the agreement is vitiated by undue influence and coercion and therefore unenforceable. The trial Court dismissed the suit, being of the view that Exhibit P-1 was taken under coercion and undue influence. The new trial Bench, however, reversed the decision of the trial Court and decreed the suit as prayed for. The question is whether the Full Bench of the Court of Small Causes could reverse the decision of the trial Court, and if it did desire to so reverse and find a fact in a manner otherwise than that found by the trial Court, whether it could dispose it of by itself.

It is not necessary, for purposes of this petition, to traverse any more into the oral or documentary evidence adduced in this case.

It is no doubt true that Courts presided over by Judges who are necessarily human can weigh the *pros* and *cons* of the evidence before them and come to conclusions different from that arrived by the Courts subordinate to them. But this general rule has some exceptions when considered in the light of the jurisdiction conferred upon them by statutes. Under section 37 of the Presidency Small Cause Courts Act, 1882, it is provided;

"Save as otherwise provided by this Chapter (Chapter VI) or by any other enactment for the time being in force, every decree and order of the Small Cause Court in a suit shall be final and conclusive "

After imprinting the judgment of a Small Cause Court with such finality and conclusiveness, section 38 provides for a new trial of contested cases, under which the new trial Bench, on an application by the aggrieved party, within the prescribed time, may order a new trial to be held, or alter, set aside or reverse the decree or order, upon such terms as it thinks reasonable. Section 38 has been the subject-matter of interpretation in several judgments of this Court. Even on a *prima facie* reading of the said section read in conjunction with section 37 which gives a finality and conclusiveness to the decrees and orders of the trial Court in the Small Causes Court, it appears to me that the powers of the new trial Bench are purely revisional and not appellate in character. As prefaced by me, it is possible that a different mind might come to a different conclusion on the same set of facts. But that by itself does not enable the new trial Bench of the Court of Small Causes to reverse the decision of the trial Court only on the ground that on the facts and circumstances, of that particular case, it has come to a conclusion different from that arrived at

by the trial Court. In *Sadasook Gambir Chund* v. *Kannayya*[1], the majority of the learned Judges of the Full Bench were of the view that even in a case where a new trial Bench might reasonably come to a different conclusion other than that arrived at by the trial Court, yet they would be transgressing the limits of jurisdiction conferred upon them if they so reverse a judgment of the trial Court on questions of fact. More clearly another Full Bench of our Court in *Sai Sikandar Rowther* v. *Ghouse Mohideen Marakayar*[2], held as follows :

> "A Full Bench of the Small Cause Court sitting under section 38 of the Presidency Small Cause Courts Act has no jurisdiction to decide questions of fact generally, nor has it jurisdiction to decide questions of fact, when those questions of fact first arise before it in consequence of its finding on a question of law."

This is a case in which the trial Court found as a fact, at any rate at the end of the judgment, that Exhibit P-1 is vitiated by undue influence and coercion. This is a finding of fact. Under section 38, the Full Bench of the Court of Small Causes has no jurisdiction to reverse the said finding of fact as their jurisdiction is purely revisional. On this ground it is sufficient to set aside the order of the new trial Bench of the Court of Small Causes But as justice should not only be done, but seem to be done, I have considered it desirable in the instant case to probe further and indicate as to what ought to have been done by the new trial Bench in such circumstances.

In the instant case, the learned Judges, as reasonable and prudent men, have decided to disagree with the trial Judge on a question of fact In such circumstances, is it to be assumed that they are helpless and for want of jurisdiction they should refrain from in any manner interfering with the judgment of the trial Court? This is not so It is only to avoid such a misconception that section 38 provides that the new trial Bench has the power to order a new trial to be held. The expression "may order a new trial to be held" appearing in section 38 is specially significant. It is appropriate that in circumstances where the new trial Bench definitely is of the opinion that the findings of fact of the trial Court cannot be sustained, it can remit the matter to the trial Court for a re-consideration of the entire issue. The new trial Bench has the power in such circumstances to direct a new trial of the case by remitting the matter to the trial Court. It is possible that they can give their mind and indicate their views as well in the order of remittal. This is, however, left to the discretion of the Bench trying the matter. But if once they come to the conclusion that the findings of fact of the trial Judge cannot be supported, it is not to be taken that they have no jurisdiction at all to do anything in the matter as their powers are purely revisional. As pointed out by Wadsworth, J., in *Kuppiah Chetty* v. *Saraswathi Ammal*[3].

> "If it (Full Bench of the Small Causes Court) comes to the conclusion that the findings of fact by the trial Court are unsupported by evidence and are such as to justify interference in revision the proper procedure is not to give fresh findings of fact but to order a retrial at which the facts may be gone into afresh"

With these observations I very respectfully agree.

I have already stated that justice should not only be done but seem to be done. The provocation for my observation is that the trial Judge has found both for and against the respondent (plaintiff). The following observations of the trial Judge make the position clear I am extracting the relevant excerpts in the judgment in support of my observation

> (a) "Even at the outset it should be noted that there is no evidence worth the name to support the contention of the defendant"

> (b) "If really there is any truth in the defence regarding the alleged coercion and undue influence, one would expect the defendant to repudiate the agreement within a reasonable time after she executed it"

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1 I L R 19 Mad 96

2 (1917) 32 M L J 213 I L R 40 Mad. 355

3 (1941) 2 M L J 571

(c) "Even in that reply telegram details of the alleged undue influence and duress were not mentioned"

(d) "It is difficult to conceive how the plaint ff's clerk could have exerc sed undue influence upon the defendant in executing the agreement"

But the following extracts g ve a different colour to the ent re subject

(1) "The circumstances were such that she had no alternat ve but to sign though she knew that the amount was excessive

(2) "On a consideration of the ev dence I *think* the letter Exhibit P-1 was taken under coercion and undue influence . . ."

After making such irreconcilable observations, the learned Judge dismissed the suit

It is not clear from the judgment of the trial Court as to what is the clinching finding of fact which prompted him to dismiss the suit It is in this respect that I desire that the suit should be tried once over, so that a clear finding of fact may be secured on the question in issue whether Exhibit P-1 is tainted by coercion or undue influence.

Whilst therefore setting aside the order of the new trial Bench, I direct that the case be remitted to the Court of Small Causes for being tried with liberty to either party to adduce such oral or documentary evidence in the case as they may deem necessary. No costs.

V S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT :—MR JUSTICE P RAMAKRISHNAN

K. M Lakshmanan . *Petitioner**

v.

The State of Madras, represented by the Collector of North Arcot District (The District Revenue Officer, North Arcot) and another *Respondents.*

Rice Milling Industry (Regulation) Act (XXI of 1958), *section* 8 (3) (c)—*Lease of rice mill consisting of machinery and building—Only one item of machinery belonging to lessee—Application by lessee under section* 8 (3) (c), *after the termination of lease, for shifting of rice mill to new premises—Maintainability.*

Where a rice mill taken on lease by a lessee, and for which he was granted a licence under the Rice M lling Industry (Regulation) Act, was a composite unit involving several items of machinery and building and all that the lessee was entitled to as his own in connection with the rice mill was a single piece of electric motor, the lessee cannot, after the termination of the lease, apply under section 8 (3) (c) of the Act for the shifting of the rice mill to new premises, so that he might carry on rice milling business thereunder the old licence When he seeks to use his electric motor and carry on rice milling business in some other place using other machinery and equipment, it will really be a case of starting of a new rice mill and not that of shifting the previous mill or a part of the previous mill for which he had obtained a licence

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to call for the records relating to the petitioners' application for change of location of his rice mill, dated 18th July, 1964, and issue a writ of *mandamus* directing the respondent No. 1 herein to exercise jurisdiction under section 8 (3) (c) of the Rice

* W P No 486 of 1965 27th September, 1967

Milling Industry Act of 1958 for change of location of the existing rice mill and grant permission to the petitioner to shift the plant and machinery to the new building from the old one in Survey No. 654/2A in Cheri Village, Arkonam taluk, and carry on the rice milling operations therein.

N. C. Raghavachari, for Petitioner.

J. Kanakaraj, for Government Pleader, for 1st Respondent and *R. D. Indrasenan*, for 2nd Respondent.

The Court made the following

ORDER.—The petitioner, K. M. Lakshmanan, obtained a lease for a period of four years from 12th October, 1960 of a rice mill belonging to the predecessor-in-title of the 2nd respondent Sanjeevi Mudaliar. Previously there was a licence to run that rice mill in the name of the predecessor of the 2nd respondent. Consequent upon this lease the petitioner obtained a licence under the Rice Milling Industry (Regulation) Act, 1958 for running the rice mill from 17th July, 1962. The petitioner however continued to have the licence for a period ending 31st March 1965, after renewal. In the meantime consequent on the fact that the lease in favour of the petitioner from the brother of the 2nd respondent had expired on 11th October, 1964 disputes arose between the 2nd respondent and the petitioner about the recovery of possession of the rice mill. According to the 2nd respondent, the petitioner filed a suit for injunction and the suit was dismissed on 31st August, 1965 for default. In the meantime accepting the representation of the 2nd respondent that the petitioner was not entitled to continue to run the rice mill as the lease had expired on 11th October, 1964, the Collector of North Arcot, the licensing authority, suspended the licence granted to the petitioner with effect from 9th February, 1965. The petitioner appealed against the order to the Board of Revenue. In the meantime the petitioner applied to the 1st respondent (the Collector of North Arcot) relying on section 8 (3) (*c*) of the Act for the shifting of the machinery of the rice mill in respect of which renewal of the licence was granted to him upto 31st March, 1965, to some other building which he had built for housing a rice mill. This application was rejected by the Collector by an order passed on 22nd December, 1964 stating that the application purporting to be under section 8 (3) (*c*) of the Act for shifting the machinery from the present rented building was really for an altogether new rice mill to be run in the village. In view of that fact the petitioner was required to apply for a fresh permit under section 5 of the Act. The petitioner had filed this writ petition for a writ of *mandamus* directing the 1st respondent to exercise his proper jurisdiction under section 8 (3) (*c*) of the Act.

The petitioner's principal contention is that the Authority, namely, the 1st respondent (Collector of North Arcot) ought to have granted the prayer for shifting the machinery under section 8 (3) (*c*) of the Act. Section 8 (3) (*c*) of the Act reads thus :

> "(3) No owner of a rice mill.................
>
> ....
>
> (*c*) shall, without the previous permission of the Central Government change the location of the whole or any part of the rice mill in respect of which a licence has been granted under section 6".

This application was strenuously resisted by the 2nd respondent, Sanjeevi Mudaliar, the brother of the former owner of the rice mill, who had granted a lease of the rice mill to the petitioner. He contends that under the terms of the lease the petitioner was to enjoy the building as well as the oil and rice mill machinery there but he had the option to change the prime mover of the rice mill. In fact at the time of the lease there was oil engine, but subsequently relying upon particular term of the lease, the petitioner got an electric motor belonging to him substituted in the place of oil machine, and was using the rest of the machinery including the hullers belonging to the 2nd respondent as well as the premises of the 2nd respondent for hulling rice, and

relying upon the licence issued to him On the expiry of the lease period the only part of the rice mill which belonged to him was the electric motor, the rest of the rice mill was the property of the 2nd respondent. Therefore the petitioner cannot urge, when all that he was entitled to in connection with the rice mill for which the earlier licence was granted to him was a single piece of electric motor, that he would be entitled to apply as owner (or lessee) of the rice mill to shift the whole or part of the machinery of the rice mill to new premises, so that he might carry on rice milling business thereunder the old licence Reference was made in this connection to the application for permit which refers to the place where the rice mill is to be established, the particulars of the prime mover, details of the milling machinery, namely, particulars of the huller, milling capacity and several other details. The rice mill is therefore a composite unit involving several items of machinery, buildings and other machineries. When a person has been granted a licence for this composite unit under the Act, he cannot urge after the lease of the entire composite unit had terminated and he has got in his possession only one item of machinery from the rice mill, namely, the electric motor, what he is seeking is the shifting of the machinery of a rice mill that belonged to him to new premises, so that he might be enabled to carry on rice milling business under the old licence in the new premises In fact after the termination of the lease granted to him by the brother of the 2nd respondent, the petitioner had ceased to be the lessee of the rice mill for which he had been granted renewal of licence. All that remained to him of the rice mill of which he was the lessee, was the electric motor When he seeks to use that electric motor and carry on rice milling business in some other place using other machinery and equipment it will really be a case of starting a new rice mill and not shifting the previous mill or a part of the previous mill for which he had obtained a licence on the footing that he was still the owner of the rice mill Therefore, there is good reason for supporting the order of the 1st respondent in rejecting the application of the petitioner under section 8 (3) (*c*) of the Act There are no merits in this writ petition. The writ petition is dismissed with costs of the 2nd respondent. Advocate's fees Rs 100.

V.K. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE N KRISHNASWAMY REDDY.

Public Prosecutor .. *Appellant**

v.

M. Sethuvel Chettiar and others .. *Respondents.*

Prevention of Food Adulteration Act (XXXVII of 1954), *sections* 2 (i) (a) (i), 7 (i) and 16 (1) (a) (i), *rule* 5, *Appendix B—Ice cream—Preparation of—Ice Cream made from skimmed milk—If should contain milk fat.*

The definition of "Ice Cream" specified in Appendix B to the rule 5 of the Prevention of Food Adulteration Rules, makes a distinction between ice cream made with cream, milk or other milk products on the one hand and Ice Cream made with cream, milk or other milk product, there must be 36 per cent. solids and 10 per cent milk fat excepting the ice cream containing fruits or nuts or both, where the content of milk fat should not be less than 8 0 per cent. Though skimmed milk appears to be a milk product, it has been specifically separated from the other milk products and brought as a separate category of ice cream prepared with such skimmed milk which shall contain at least 8 5 per cent. of milk solids.

Should the milk fat be present in the ice cream made of skimmed milk?

It is clear from the definition of 'skimmed milk' that the fact either wholly or substantially is removed in the skimmed milk and that it should contain not less

* Cr.A. Nos 212, 291, 729 and 277 of 1965 19th October, 1967.

than 8.5 per cent. of milk solids. If the Ice Cream is made of milk or skimmed milk, it should invariably contain not less than 8.5 per cent. of milk solids. Ice Cream made of milk or cream or any other product should contain the specified percentage of milk in the definition of 'Ice Cream'. If ice cream made of skimmed milk were also to contain the similar percentage of milk fat, there will be practically no difference between ice cream made of milk and skimmed milk. This cannot be the intention of the rule-makers.

Appeals under section 417 of the Code of Criminal Procedure, 1898, against the acquittal (*i*) of the respondent (accused) in C A. No 212 of 1965 of an offence under sections 2 (*i*) (*a*) (1) 7 (1), and 16 (1) (*a*) (*i*) of the Prevention of Food Adulteration Act XXXVII of 1954 and Cl A. 11 11 of Appendix B to rule 5 of the Rules framed thereunder, by the District Magistrate, Madurai in C C No. 322 of 1964; (*ii*) of the respondents (accused) in C A No. 291 of 1965 of an offence under sections 2 (1) (*a*) (1), 7 (*i*) and 10 (1) (*d*) (*i*) of the Prevention of Food Adulteration Act XXXVII of 1954 and Cl. A 11 11 in Appendix B to rule 5 of the rules thereunder, by the District Magistrate, Madurai, in C C No. 372 of 1964; (*iii*) of the respondents (Accused 1, 3 and 4) in C.A No 729 of 1965 of an offence under section 7 (1) read with sections 16 (1) and 17 (1) of the Prevention of Food Adulteration Act against accused 1 and 3 undersection and 7 (1) read with section 16 (1) of the Prevention of Food Adulteration Act against accused-4, by the Sessions Judge of the Court of Session, Madurai, in C.A No 47 of 1965 (C C No. 217 of 1964, Additional First Class Magistrate I, Madurai), (*iv*) of the respondents (accused Nos. 1, 2 and 4) in C A No. 877 of 1965 of an offence under section 2 (1), (*a*) (1) 7 (1) and 16 (1) (*a*) (1), read with section 17 of the Prevention of Food Adulteration Act XXXVII of 1954 and Cl. A 11 11 in Appendix B to rule 5 of the Rules thereunder, by the Sessions Judge of the Court of Session, Madurai in C.A. No. 109 of 1965 (C.C No. 175 of 1964, Additional First Class Magistrate II, Madurai).

Calvin Jacob, for Public Prosecutor, for Appellant.

T. S. Arunachalam, *S Bhaskaran*, *S. Palaniswamy* for *K. Sangothian*, *V. C. Palaniswamy*, *G M Ramachandran* and *K. Alagiriswamy*, for Respondents.

The Court delivered the following

JUDGMENT.—These appeals have been filed by the learned Public Prosecutor against the orders of acquittal. The respondents in all these cases were prosecuted for offences under sections 2 (*i*) (*a*) (1), 7 (*i*) and 16 (1) (*a*) (*i*) of the Prevention of Food Adulteration Act and Clause A 11 11 in Appendix B to rule 5 of the Prevention of Food Adulteration Rules. As the point raised in all these appeals is the same, they are disposed of together. The subject-matter in all these appeals is ice cream made of skimmed milk

The respondent in C A No. 212 of 1965 was the proprietor of Vasudev Ice Factory, Cool House at Door No 166, West Masi Street, Madurai. The Sanitary Inspector, Madurai Municipality, purchased 600 grams of ice cream from the respondent for sample On analysis by the Analyst, the sample was found to be deficient in fats to the extent of 80 per cent.

In C A. No 291 of 1965, the Sanitary Inspector purchased 600 grams of ice cream from the respondents as sample. On analysis, it was found that the sample was deficient in fat to the extent of 66 per cent

The Food Inspector filed complaints against the respondents in both these appeals before the District Magistrate, Madurai It was contended by the respondents that the ice cream was made of skimmed milk and that under the Rules, it need not contain fat. The learned District Magistrate acquitted the respondents on the main ground that the ice cream made of skimmed milk need not contain fat.

In C.A. No 729 of 1965, the respondents from whom ice cream was seized by the Food Inspector were prosecuted before the Additional First Class Magistrate No. 1, Madurai. The ice cream seized on analysis was found to be deficient in

fat to the extent of 47 per cent The Additional First Class Magistrate convicted all the respondents and sentenced each of them to pay a fine of Rs. 100. On appeal, the Sessions Judge, Madurai acquitted the respondents on the ground that the ice cream was made of skimmed milk and that it need not contain fat according to the definition of 'Ice Cream' made of skimmed milk.

In C.A. No 877 of 1965, the respondents from whom ice cream was seized were prosecuted before the Additional First Class Magistrate II, Madurai. The ice cream on analysis was found to be deficient in fat to the extent of 14 per cent. It was contended by the respondents that the ice cream was made of skimmed milk. The Additional First Class Magistrate convicted the respondents and sentenced each of them to pay a fine of Rs. 250. On appeal, the Sessions Judge acquitted the respondents holding that the ice cream seized from them was made of skimmed milk and no fat is required in such ice cream

The learned Public Prosecutor does not dispute that what was seized from the respondents in all these appeals was ice cream made of skimmed milk. But, however, he would contend that 10 per cent. of fat required for an ice cream must also be present in ice cream made of skimmed milk and that the findings of the lower Courts that no fat is required in ice cream made of skimmed milk is based upon the erroneous conception of the definition of 'Ice Cream' and 'Ice Cream made of skimmed milk'. It is, therefore, necessary to note the relevant rules and definitions framed under the Prevention of Food Adulteration Act

Rule 5 of the Prevention of Food Adulteration Rules lays down standards of quality of the various articles of food specified in Appendix B to the Rules as defined in that Appendix.

'Ice Cream' is defined in A 11.11 to Appendix B as follows:

"Ice cream means the frozen food made with cream, milk or other milk products, sweetened with sugar or honey and with or without (*a*) egg, (*b*) fruits, (*c*) nuts, (*d*) chocolates, (*e*) stabiliser not more than 0 5 per cent. of the finished product, and (*f*) permissible flavour or colour. It shall contain not less than 36 per cent. by weight of solids and 10 per cent. by weight of milk fat except that when the ice cream contains fruits or nuts or both, the content of milk fat may be proportionately reduced but not less than 8.0 per cent. by weight. It shall not contain any starch, artificial sweetening agent or any other extraneous matter Ice cream prepared from skimmed milk shall not contain less than 8.5 per cent. of milk solid sother than milk fat."

This definition broadly makes a distinction between ice cream made with cream milk or other milk products on the one hand and ice cream prepared from skimmed milk on the other. In the ice cream made with cream, milk or other milk product, there must be 36 per cent. solids and 10 per cent. milk fat excepting the ice cream containing fruits or nuts or both, where the content of milk fat should not be less than 8 0 per cent Though skimmed milk appears to be a milk product, it has been specifically separated from the other milk products and brought as separate category of ice cream prepared with such skimmed milk which shall contain at least 8 5 per cent. of milk solids.

The point to be determined is whether milk fat is required to be present in the ice cream made of skimmed milk 'Skimmed Milk' is defined in A. 11.02 as milk from which all or most of the milk fat has been removed by mechanical or any other process and includes 'separated milk' or 'machine skimmed milk' and the milk solids other than milk fat shall not be less than 8 5 per cent. It is clear from this definition that the fat either wholly or substantially is removed in the skimmed milk and that it should contain not less than 8 5 per cent. of milk solids. If ice cream is prepared with skimmed milk, in the nature of things, it cannot contain fat unless cream is added. 'Ice Cream' under definition A. 11.11 can be made with cream, milk or other milk products and also with skimmed milk which is a milk product. But cream, milk or other milk products which contain milk fat

is taken as one category in making ice cream, and skimmed milk where fat is wholly or substantially removed, is taken as another separate category 'Cream' under A 11.10 should contain not less than 23 per cent of milk fat But if ice cream is made of cream, the minimum milk fat required is only 10 per cent besides other ingredients 'Cow milk' under A 11 01 01 shall contain 3 per cent. to 4.0 per cent. of milk fat besides 8 5 per cent of milk solids 'Buffalo milk' under A. 11.01.02 shall contain not less than 5 to 6 per cent of milk fat and 9 per cent. of milk solids 'Goat or sheep milk' under A 11 01 03 shall contain not less than 3 per cent to 3 5 per cent. of milk fat and 9 per cent. of milk solids All the milk products other than skimmed milk like toned milk (A. 11.04), Double Toned Milk (A. 11.04 01), standardised milk (A 11 04 02), butter (A 11 05), Koha (A. 11 13) and ghee (A. 11.14) shall contain milk fat of various percentages mentioned in the respective definitions The products of skimmed milk do not require the presence of fat whereas minimum milk solids are to be present (Refer to A 11.06 (*b*) skimmed milk, dahi or curd, (A. 11 08) condensed skimmed milk, (A 11.09 01 skimmed milk Chhanna and A. 11 10 02 dry skim milk) In these cases, various percentages of milk alone are required and milk fat is completely excluded. From this analysis, it is clear that whenever anything is made of skimmed milk or whatever product was obtained from skimmed milk, it need not contain fat. As already stated, ice cream can be made of either cream or milk or any milk product or skimmed milk There is no indication in the definition of 'Ice Cream' that cream should be present in ice cream made of skimmed milk. If ice cream can be made of milk or any other milk product without cream, it can equally be made of skimmed milk without cream The learned Public Prosecutor is unable to say that the ice cream made of skimmed milk should contain cream.

If skimmed milk, as contended by the learned Public Prosecutor should contain fat, there cannot be any difference between ice cream made of milk and ice cream made of skimmed milk Milk, besides the milk fat should contain at least 8 5 per cent of milk solids Skimmed milk also must contain not less than 8.5 per cent. of milk solids So far as milk solids are concerned, there is no difference between milk and skimmed milk If ice cream is made of milk or skimmed milk, it should invariably contain not less than 8 5 per cent of milk solids Ice cream made of milk or cream or any other product should contain the specified percentage of milk fat in the definition of 'Ice Cream' If ice cream made of skimmed milk were also to contain the similar percentage of milk fat, there will be practically no difference between ice cream made of milk and skimmed milk This cannot be the intention of the rule-makers As noted already, skimmed milk and any product of skimmed milk is d strictly defined and its standards are fixed It appears, a portion of the definition of 'skimmed milk' in A 11 02 that the milk solids other than milk fat shall be not less than 8 5 per cent. is bodily carried over in A 11 11. The words 'other than milk fat' mentioned in A 11.11 is a repetition of what is mentioned in A 11 02 These words mean, any fat left over in the skimmed milk in the process of removal of fat either by mechanical or any other process That fat which is left over has to be ignored as fat is not a standard required for skimmed milk.

For the foregoing reasons, I am of the opinion that ice cream made of skimmed milk need not contain milk fat, but it should contain not less than 8 5 per cent. of milk solids. The respondents in all these appeals have been rightly acquitted

The appeals are dismissed.

V M K. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR M ANANTANARAYANAN, *Chief Justice*

The Chairman, Madras State Electricity Board, having its branch at Gobichettipalayam .. *Petitioner**

v.

Gobichettipalayam Municipality, by its Commissioner, and another .. *Respondents.*

Madras District Municipalities Act (V of 1920), *rules* 18 (1) (*a*) *and* (*b*) *and* 18 (2) *of Schedule IV—Profession tax—Madras State Electricity Board—Liable to pay tax in every one of its centres or branches—Company and person—Distinction*

The Madras State Electricity Board is liable to pay profession tax as assessee in every one of its centres or branches situate in Municipalities or Panchayats, where it transacts business for the concerned year. The liability of the Board must be determined only on its income under rule 18 (1) (*a*) and (*b*) and rule 18 (2) of the Schedule relevant to that centre, either on the basis of the income-tax assessment or otherwise as specified under the rules.

Section 93 (4) of the Act will have no application as it relates to a person and not to a company Under the Act, the scheme of dichotomy is throughout observed between 'person' and 'company.'

The basis for the taxation of a company is not residence

Petition under section 115 of Act V of 1908 praying the High Court to revise the Decree of the Court of the Subordinate Judge, Erode, dated 25th January, 1964 and passed in A S No 244 of 1962 (O S No 352 of 1961 on the file of the Court of the District Munsif of Gobichettipalayam, dated 26th July, 1962).

C. Ramakrishna, for Petitioner.

The Advocate-General, for Respondent.

The Court delivered the following

JUDGMENT.—This revision proceeding involves a question of some interest and importance. That question may be tersely expressed in the form whether the Madras State Electricity Board, a statutory body, transacting the business of the supply of electricity to consumers in many Municipalities and Panchayats of the State, is liable to pay profession tax for the concerned half year in all those places, or can claim that a single payment of profession tax at the maximum rate of Rs. 125 for the half year at one centre of business, or at its headquarters will suffice, and that the amount of this tax must be proportionately divided among all the Municipalities and Panchayats, where the Board maintains Branch establishments supplying electricity to the concerned consumers. The point really arose with reference to Gobichettipalayam Municipality in a suit to recover several assessments of half-yearly profession tax amounts from the petitioner Board.

The point argued by Sri C Ramakrishna for the Board can be placed, at its highest level, in the following form There are certain *dicta* of Muttuswami Ayyar, J., in an early case *Tuticorin Municipality* v. *South Indian Railway*[1], on the nature of this tax and the liability of a vast organisation like the South Indian Railway in that case "to pay as many profession taxes as there are Municipal Towns through which their Railway passes", in the words of the learned Judge. Sri Ramakrishna relies on this decision, for his view that profession tax is really of the character of "a licence or registration fee", to quote Muttuswami Ayyar, J., and that, it need be paid only once, particularly at the maximum rate, though there may be several centres where the concerned company, which is a legal person, is conducting its business.

* C R P No. 1459 of 1965 27th October, 1967

1. (1890) I L R. 13 Mad 78.

This argument, unfortunately, is unsustainable because of the broad fact that Muttuswami Ayyar, J., was really laying down the law with regard to the District Municipalities Act (IV of 1884) as it then stood, since then, there have been several very significant developments, and the Act incorporating the latest amendments, as it stands today, exhibits a very significant dichotomy as between a 'person' and a 'company', the two entities being treated differently in the several relevant sections. As far as Act IV of 1884 is concerned, certain features of it are vital for elucidating the *dicta* of Muttuswami Ayyar, J., in *Tuticorin Municipality* v *South Indian Railway*[1]. First of all, 'person' was defined in section 3 (*xxii*) of that Act, to include any company or association, or body of individuals, whether incorporated or not. Secondly, under section 53 of that Act, the liability was fixed upon a person as defined, and under section 59, a person who carries on more professions or trades than one, or holds more offices or appointments than one, was to be charged only under any one of such designations or classes, on his aggregate income. Even more significantly, under section 60, no person shall be liable to the payment of tax under section 53, who shall prove that he has paid the tax for the same half year in any other Municipality It is for this reason that Muttuswami Ayyar, J., held that the South Indian Railway need to pay tax once at the highest rate, though it may be conducting business in all the Municipal Towns through which the Railway passes. Another early decision of this Court, namely, *Municipal Council of Tellicherry* v *Bank of Madras*[2], may also be referred to, for the view that even if the Bank carried on more than one class of business, it would not be liable to pay more than one tax, though the relevant class might have to be determined by the aggregate income.

The learned Advocate-General for the State has taken me through all the subsequent vicissitudes of the Madras District Municipalities Act, particularly the sections of Act V of 1920 and the rules for assessment of profession tax then prevailing, rules 17, 18 and 19. He has also referred me to section 95 as it originally stood under the 1920 Act I do not propose to proceed into these details, for the simple reason that the broad contention of the State can easily be sustained on an analysis of the provisions of the Act as it stands today, incorporating the amendments in 1930. Apparently, in the Rules framed under the earlier Act, certain examples were given to show that a 'person', *viz*, an officer like a Sub-Collector, at any rate, who paid profession tax in one Municipality, and was transferred in the course of the half year and faced with a demand by another Municipality, could claim the benefit of the first payment itself, if it had related to the entire income for the half year. The real point is not this, but whether section 93, as it stands, can sustain the interpretation of Sri Ramakrishna that the Board need pay only one tax at the highest level once in the half year, and that this tax should be proportionately divided between the Municipalities, in all of which the Board conducts its business.

The matter can be put in this form Under the Act, as it stands, the scheme of dichotomy is throughout observed between 'person' and 'company'. The latest definition of 'company' is that it means "a company as defined in the Indian Companies Act, 1913, or formed in pursuance of an Act of Parliament (of the United Kingdom) or of Royal Charter, or Letters Patent . . . . and includes any firm or association carrying on business in the Presidency of Madras whether incorporated or not . ... " 'Person' is not defined But the scheme of section 93 leaves us in no possible doubt about the dichotomy 'Person' and 'company' are kept distinct, and treated differently by separate provisions of the law Before proceeding further with an analysis of section 93, I may refer to the Full Bench decision of the Andhra Pradesh High Court in *Ramdas Motor Transport (P) Ltd.* v *Vijayawada Municipality*[3], where the very point was considered in an exhaustive manner, with reference to all prior precedents The learned Judges point out that the provisions of section 93 (4), on which reliance was sought to be

1 (1890) I L R 13 Mad 78
2 (1892) I.L.R 15 Mad 153.
3 (1967) 2 An W R 174 (F B).

placed, applied only to an individual like a human person, and not to a *company*. Section 93 (4) contains the word 'person' and the provision utilises pronouns like 'he', 'who' and 'his', which are applicable only to the individual, and not to a company.

Proceeding to the scheme of section 93, section 93 (1) (*a*) contains sub-clauses (*i*) and (*ii*) with regard to the person exercising a profession, art, or calling, or transacting business, or holding an appointment. Under section 93 (2), such a person is chargeable under the appropriate clause with regard to the aggregate income from all the sources specified in sub-section (1) Section 93 (3) applies both to a 'company' and 'person', with the distinction maintained. Neither such company nor person, is liable "by reason merely of change of place of business, exercise of profession, art or calling, appointment or residence" to pay any other Municipality during the concerned half year, having earlier paid profession tax to any one Municipal Council or local body, "more than the difference between such sum and the amount to which it or he is otherwise liable for profession tax for the half year."

This section is not invoked in the present case, and it does not help the argument of the Madras State Electricity Board There has been no change of place of business, exercise of profession, art or calling, and it is not by virtue of such change that any relief is claimed. On the contrary, the argument is that section 93 (4) applies, and that only one tax at the highest rate has to be proportionately divided between the relevant local authorities by the State Government, the decision of which Government has to be final. Section 93 (4) runs as follows:

"Nothing contained in this section shall be deemed to render a person who resides within the local limits of one local authority and exercises his profession, art or calling or transacts business or holds any appointment within the limits of any other local authority or authorities liable to profession tax for more than the higher of the amounts of the tax leviable by any of the local authorities. In such a case, the State Government shall apportion the tax between the local authorities in such manner as they may deem fit and the decision of the State Government shall be final".

It appears to me to be very clear that, with respect, the learned Judges of the Full Bench, earlier referred to were justified in the view that they took, that upon the language and the interpretation of the provision, section 93 (4) could not possibly apply to a company. It is claimed by the learned Advocate-General that the contention of the State on the question of interpretation receives implicit support from the following authorities of this Court: *Madurai Municipality* v *Indian Textile Paper Tube Co.*[1], *Commissioner of Corporation, Madras* v *Arooran Sugars Limited, Madras*[2], *Commissioner of Corporation, Madras* v. *Godrej Soaps (P) Ltd* [3] and *Indian Leaf Tobacco Development Co, Ltd* v *Corporation of Madras*[4] Under rule 16 of Schedule IV, the classes for both companies and persons as specified, and the maximum half-yearly tax is determined as Rs. 125 Under rule 17, a company or person shall be deemed to have transacted business, and a person shall be deemed to have exercised a profession, art, or calling or held as appointment within a municipality, if such company or person has an office or place of employment within such municipality Again, reference may be made to Article 276 of the Constitution, with regard to the nature of this levy. Under Article 276 (1) of the Constitution, this levy, though in form or semblance a tax on income, is saved from any invalidity because of Article 246, and under Article 276 (2), the total amount payable in respect of any one person to any one municipality, is not to exceed Rs 250 per annum.

The interpretation of the scheme of section 93 now becomes very clear. In view of the sustained dichotomy and the effect of rule 17 that I have earlier set forth, a company is liable to pay profession tax in every municipality where it

1 (1965) 2 M L J 510
2 (1965) 78 L W 52
3 (1962) 2 M L J 308.
4 I.L R (1954) Mad 417 (1954) 1 M L J. 176.

transacts business, and where such transaction of business is evidenced by the maintenance of an office for the half-year In this connection my attention has been drawn to an interesting judgment of Rajamannar, C J., and Venkatarama Ayyar, J., in *Indian Leaf Tobacco Development Co , Ltd* v *Corporation of Madras*[1]. That related to the expression 'transacting business' in section 113 (1) of the City Municipal Act, and the Division Bench held that a company must be held to be transacting business, even though it did not earn any income as such in the city, during the period in question. It becomes clear that the Madras State Electricity Board is liable to pay profession tax as assessee in every one of its centres or branches situate in Municipalities or Panchayats, where it transacts business for the concerned half year. It is not entitled to invoke the benefit of section 93 (4), and to argue that it is liable to pay only one tax, which must be proportionately divided by the State Government. As the Full Bench pointed out, section 93 (4) relates only to a person who resides within the local limits of one local authority and exercises his profession, art or calling within the limits of any other local authority The basis for the taxation of a company is not residence at all, as stressed by the Full Bench I have no hesitation, therefore, in coming to the conclusion that the Madras State Electricity Board was rightly assessed to profession tax at all the centres where it transacted business during the half-year in question.

It is needless to add, and this is not disputed by the learned Advocate-General, that in each such centre, the liability of the Board must be determined only on its income under rule 18 (1) (*a*) and (*b*) and rule 18 (2) of the Schedule; relevant to that centre, either on the basis of the Income-tax assessment, or otherwise as specified under the rules. I am leaving entirely open the question whether, on the relevant basis, the Madras State Electricity Board would not be entitled to claim a refund, if it can prove that, at any one branch in respect of payment of profession tax at the maximum rate of Rs. 125 it had transacted business for less than the amount specified in the Schedule, namely, Rs. 15,000, and so should have been assessed at a lower figure. As far as the relevant half-years of this Municipality (Gobichettipalayam) are concerned, it is a finding of fact of the Courts that the business transacted by the Board justified imposition of the maximum tax

The revision petition is accordingly dismissed As it has really turned upon the interpretation of a legal question, the parties will bear their own costs.

V S ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE R SADASIVAM.

Raman Nair .. *Petitioner**

v.

State by the Commissioner Karaikudi Municipality, Karaikudi .. *Respondent.*

Madras District Municipalities Act (V of 1920), *sections* 249 (3) *and* 321 (4)—*Refusal to grant licence to run tea stall on a Government's land vested in the Municipality—If justified under section* 321 (4)—*Section* 249 (3), *if violative of Article* 19 (1) (f) *of the Constitution*

On the question whether a Municipality can legitimately refuse to grant a licence under sections 249 (3) and 321 (4) of the Madras District Municipalities Act (V of 1920), to a person who wants to run a tea stall on a site belonging to the Government which is statutorily vested in the Municipality, particularly when B memo proceedings have been taken, *Held,* that section 249 (3) is not violative of Article 19 (1) (*g*) of the Constitution, it would cause considerable inconvenience to the public and the Municipality to allow trespassers to claim a licence, or renewal of licence, as a matter of right

1 (1954) 1 M L J 176 : I L.R (1954) Mad. 417

* Cr R C No 481 of 1966 8th November, 1967.
(Cr R P No. 474 of 1966).

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the District Magistrate, Ramanathapuram at Devakottai, dated 1st December, 1965 in C A No 160 of 1965, (C C No. 1081 of 1965 on the file of the Court, of the Sub-Magistrate, Karaikudi).

S. Ramasubramaniam, for Petitioner.

R. Veeramani, for Public Prosecutor, for State.

K. Gopalaswami, Respondent

The Court made the following

ORDER —The petitioner Raman Nair has been convicted under section 313 read with section 249 of the Madras District Municipalities Act (V of 1920) and sentenced to pay a fine of Rs 50 in default to S I for one month.

The facts are not in dispute The petitioner was conducting a tea stall in T S. No 171/VIII Kallukatti East, Karaikudi, for a number of years, after obtaining the necessary licence from the Municipality The land itself belongs to the Government and it has been vested statutorily in the Karaikudi Municipality as would appear from the Judgments of the Courts below and the evidence in this case. The petitioner was prosecuted on a prior occasion for running a tea stall without a licence but he was acquitted as evidenced by the judgment, Exhibit D-7 mainly on the ground that if the petitioner had complied with the directions of the Council marked as Exhibit D-5 in that case, the prosecution would not have been launched. It was for the year 1956-57 The petitioner applied for licence to run the tea stall for the year 1965-66 and this was refused by the Commissioner by his order Exhibit P-3, dated 17th February, 1965, on the ground, that the site T S No 171 of Ward 8 in which the tea stall is situate belonged to the Government and that the petitioner had also encroached upon the municipal site The petitioner preferred an appeal to the Municipal Council and it was not even entertained as would appear from the order Exhibit P-4 B memo has been issued against the petitioner for occupation of the site in which he wants to run a tea stall The petitioner filed O S No. 149 of 1965, on the file of the District Munsif's Court, Devakottai, for a declaration of his title to the site in dispute and wanted an injunction against the Municipality It is now admitted that the suit has been dismissed.

The learned Advocate for the petitioner put forward two contentions before me. The first contention is that the provision contained in section 249 (3) of the Madras District Municipalities Act that the Executive Authority may by an order and under such restrictions and regulations as he thinks fit grant or refuse to grant such licence infringes his fundamental right under Article 19 (*g*) of the Constitution He relied on the decision in *Md Kassim and Brothers* v *Municipal Council, Ooty*[1], in which Rajagopala Ayyangar, J , has observed that sub-section (3) of section 249 of the Madras District Municipalities Act giving an absolute power to the Executive Authority to refuse to grant a licence as also the power of imposing such restriction and conditions as he might think fit is in contravention of Article 19 (6) of the Constitution and has to be struck down as violating the fundamental rights guaranteed by Article 19 (*g*) of the Constitution. But it is clear from the judgment that the learned Judge found, that the licence was refused in that case on irrelevant grounds and the order of refusal was, therefore, liable to be quashed. This decision has been considered by a Bench of this Court in *State of Madras* v *Kamalambal Ammal and another*[2], and it has been dissented from It has been pointed out in the Bench decision that Rajagopala Ayyangar, J , did not rest his decision upon the view he took of section 249 (3) of the District Municipalities Act In Writ Petition No 2792 of 1966, Kailasam, J , has also observed that the decision of Rajagopala Ayyangar, J., was based on the merits of the case and that the view of the learned Judge regarding the constitutional validity was in the nature of *obiter dicta* He regretted his inability to accept the view of the learned Judge (Rajagopala Ayyangar, J.), that the Executive

1 (1955) 2 M L J 684. 2. Appeal No, 202 of 1956.

Authority is vested with absolute power without any guidance by the Legislature as to the imposition of relevant conditions and restrictions He has pointed out how the view taken by Rajagopala Ayyangar, J, was not accepted not only by a Bench of this Court referred to above, but also by other High Courts The decision of Kailasam, J., in the writ petition relates to the validity of section 249 (3) of the District Municipalities Act in the light of the fundamental right guaranteed under Artile 19 (*g*) of the Constitution I am, therefore, unable to accept the first contention of the learned Advocate for the petitioner that section 249 (3) of the District Municipalities Act is *ultra vires*

The second contention of the learned Advocate for the petitioner is that the order Exhibit P-3 which has been upheld by the Council by its order of rejection Exhibit P-4, is void as the grounds mentioned therein do not relate to 'public health, safety and convenience' Under section 321 (4) of the Madras District Municipalities Act—

> "Every order of a municipal authority refusing, suspending, cancelling or modifying a licence or permission shall be in writing and shall state the grounds on which it proceeds"

I have already referred to Exhibit P-3 in which it is stated that the renewal of licence was refused on the ground that the site on which the petitioner wanted to run the tea stall belonged to the Government and also on the ground that the petitioner had encroached upon municipal site I have also pointed out that the Council refused to entertain the appeal as it evidently agreed with the order Exhibit P-3. Section 249 (3) of the Madras District Municipalities Act gives wide discretion to the Executive Authority to grant or refuse to grant licence The order refusing licence could be attacked if it was made *mala fide* or out of improper motives. It is true that, having regard to the fact that an appeal has been provided against the order of the Executive Authority and the provisions contained in section 321 (4) of the Act, the refusal to grant or renew licence cannot be on arbitrary, irrelevant and fanciful grounds. But there is nothing in that clause to show that the refusal could only be on the ground of public health, safety and convenience. It is not possible to uphold such a construction merely because Chapter XII of the District Municipalities Act dealing with licences and fees containing section 249 of the Act is in Part IV of the Act dealing with public health, safety and convenience A Municipality can legitimately refuse to grant a licence to a person who wants to run a tea stall on a site belonging to the Government which is vested in the Municipality, particularly when B Memo. proceedings have been taken If the Municipality is compelled to grant a licence in such a case, it would affect its rights in respect of a property belonging to the Government and vested in it In fact, such a licence if granted would adversely affect the Municipality in a suit filed by the licensee claiming rights against the Municipality I have already pointed out that such a suit was filed and it is admitted that it has been dismissed If necessary, I would be prepared to hold that the word 'convenience' in the words 'public health, safety and convenience' found in Part IV is wide enough to include a refusal to grant licence to a party to carry on business in a property belonging to the Municipality and adversely claimed by the party It would cause considerable inconvenience to the public and the Municipality to allow trespassers to claim a licence, or renewal of licence, as a matter of right It is unnecessary to consider in this case the wider question whether the Executive Authority is entitled to refuse to grant a licence to a party to run a business on a land when there is a dispute between him and another private individual about the ownership or possession of the land I am, therefore, unable to accept the contention of the learned Advocate for the petitioner that the order refusing to renew the licence is void as being beyond the scope of the powers of the Executive Authority.

For the foregoing reasons, the revision petition fails and it is dismissed.

V M K. *Revision Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR M ANANTANARAYANAN, *Chief Justice.*

Indrani Ammal and others .. *Petitioners**

v.

A Sambanda Appah and others .. *Respondents.*

Torts—Negligence—Owner of property leasing it to tenant—Negligence of such tenant causing fire and destroying neighbouring property—Owner of the property leased—If liable to damages for the adjoining property owner

It is an established principle of common law as laid down by several decisions of the English Courts that a man shall answer to his neighbours for the conduct of each person who enters his house at his leave or knowledge, if such person does any act whereby his neighbour's house is burnt. In other words, there is a liability on the part of a proprietor of property for damage caused to the property of the neighbour by a fire accident resulting from negligence on his property even though the proprietor is not in actual occupation, but a tenant under the proprietor. A person in whose house a fire is caused by negligence is liable if it spreads to that of his neighbour and this is true whether the negligence is his own or that of his servant or guest.

Balfour v. *Barty King*, (1957) 1 All E R. 156, Rel.on.

Petition under section 115 of Act V of 1908 praying the High Court to revise the judgment and decree of the Small Cause Court, Madras in N.T A. No. 110 of 1964 O.S. No. 7913 of 1962, Small Cause Court, Madras.

R. Sundaravaradan, for Petitioners

P. R Gokulakrishnan and *A Venkatachalam,* for Respondents.

The Court delivered the following

JUDGMENT.—This revision proceeding involves a very interesting question, upon which there would appear to be no direct authority of the Indian Courts, concerning the liability of the owner of certain premises for loss or damage caused to the property of a neighbour by fire which, according to the evidence, spread from the premises of that owner to the neighbour's property. The case is a little difficult, even apart from the paucity of Indian authorities, since the facts themselves have not been very clearly established However, the first Court did find that the defendants (respondents) who are the landlords or proprietors, erected a thatched shed on their terrace at an undue height above the terrace wall, that this thatched shed took fire, and that the fire spread to the property of the neighbours (revision petitioners) and caused damages. Actually, a buffalo belonging to the revision petitioners was destroyed by the fire and the claim for Rs. 400, as damages was decreed by the trial Court.

The New Trial Bench reversed this decree, holding that the defendants (landlords) were not liable for the negligence of the tenants This, as I shall presently show, is not a correct statement of the law The New Trial Bench also held, on the facts, that the damage was " too remote to fasten any liability on the defendants". This conclusion would appear to be unwarranted. But the New Trial Bench had some justification for pointing out that the learned trial Judge relied on Exhibit P-1, a true copy of the fire report by the Fire Service, which piece of evidence had not been property proved

The Common Law of this interesting subject is to be found in several decisions of the English Courts, of which *Spicer and another* v *Smee*[1], is a good instance It is not necessary to discuss the facts of this decision, but it is important to note the principle of law that where the proprietor, who is not the occupeir, lets the property in a certain

* C.R P No 2378 of 1965 10th November, 1967.

1. 175 L T.R. (K B.) 163.

state which might amount to a private nuisance, the proprietor would be responsible to the third party who suffers injury by a fire accident. The matter has recieved a very full treatment in *Balfour* v *Barty King*[1], a judgment of Lord Goddard, C J. The learned Chief Justice has dealt with the previous history of this liability, which the law has always recognised, and he approbates the dictum that

" a man shall answer to his neighbour for each person who enters his house at his leave or knowledge... ......if he does any act........whereby his neighbour's house is burnt".

In other words, there is a liability on the part of a proprietor of property, for damage caused to the property of the neighbour by a fire accident resulting from negligence, even though the proprietor is not in actual occupation, but a tenant under the proprietor. Lord Goddard, C J , said

" At the present day, it can safely be said that a person in whose house a fire is caused by negligence is liable, if it spreads to that of his neighbour, and this is true whether the negligence is his own or that of his servant, or guest ".

With regard to the conclusion of the New Trial Bench that the negligence is too remote, I am indeed unable to gather what precisely the learned Judges implied by this. The propert es are adjacent, the thatched shed was built at some height over the parapet wall on open terrace, which might thus amount to a private nuisance, because of the great risk of a fire accident thereby involved, and the fire appears to have spread directly from this blazing shed to the adjacent property, and destroyed a valuable animal of the revision petitioner, a buffalo, capable of yielding milk The proposition that the tenant whose negligence probably led to the outbreak of the fine is directly answerable to the neighbour to whom injury was caused, is not legally correct. The vicarious liability is that of the owner of the property under whom the occupier at the t me might, no doubt have been guilty of the negligence which resulted in the fire.

However, it appears to me that, since neither the trial Court nor the New Trial Bench—has referred to any authority or any legal principle, and since, admittedly, proof of Exhibit P-1, which the tiral Court rel ed upon, must be considered questionable, the fairest course would be to set aside the decree, and to direct a complete retrial of the suit in the light of these principles that I have just now enunciated, and if Exhibit P-1 is to be relied upon, by the revision petitioners proving it in the proper manner If the parties so desire they may also adduce additional evidence on the matters which are really in issue. The trial should be conducted as expeditiously as possible. No order as to costs.

R M. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT:—MR. M. ANANTANARAYANAN, *Chief Justice*, AND MR. JUSTICE M. NATESAN

The Management of Presidency Talkies by Proprietor, Paragon Talkies .. *Appellant**

v.

N. S. Natarajan and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 33 (2) (b)—" Misconduct not connected with the dispute "—Permission under—Jurisdiction of the Labour Court—Scope of.

The word ' misconduct ' has a specific connotat on and cannot be equated with mere inefficiency or slackness It is something more positive and deliberate disobedience of any order of a superior authority will be one species of misconduct. Where it is alleged that a booking clerk in a theatre refused to obey some directions during rush hour given by the representative of the picture screened in the theatre, and the clerk had done so on the basis of his own judgment of the situa-

1 (1957) 1 All E R 156

* W.A. No. 175 of 1967. 28th November, 1967.

tion, it cannot be said that the clerk was guilty of any 'misconduct' entailing the extreme punishment of dismissal The representative of the picture owners was not a person in authority over the booking clerk employed in the theatre, in any sense. He was only a third party, who no doubt had an interest in sale of the tickets But the employee is equally entitled to have his own judgment of a particular situation in the theatre and may differ from the Picture Owner's representative Even if his judgment was not a correct one, it cannot be said that he was guilty of misconduct

It is no doubt true that a Labour Court in granting permission under section 33 (2) (*b*) of the Industrial Disputes Act does not act as a Court of Appeal in cases of disciplinary proceedings initiated by the management before a domestic tribunal The Labour Court does not interfere in such cases and substitute its own judgment for that of the management. But if there is any basic error in the procedure or findings of such domestic tribunal and if the finding is completely baseless or perverse, the Court will be justified in refusing to grant the statutory permission sought for.

Appeal under clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Venkatadri, dated 23rd March, 1967, and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 695 of 1964 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records in Petition No. 11 of 1963 dated 18th November, 1963, on the file of the Labour Court, Madras, and quash the order made therein.

N C. Raghavachari, for Appellant.

V. Krishnan, for 1st Respondent.

The Government Pleader, for 2nd Respondent.

The Judgment of the Court was delivered by

Anantanarayanan, C.J.—In our view, the learned Judge (Venkatadri, J) was perfectly justified in declining to issue a writ of *certiorari* quashing the order of the Labour Court, which itself embodies the decision of the Labour Court not to permit the management to dismiss the employee for alleged misconduct under section 33 (2) (*b*), proviso of the Industrial Disputes Act, 1947. At the outset a certain complication feature might be referred to. It appears that subsequent to the decision in this writ petition by Venkatadri, J , or, at any rate, subsequent to the order of the Labour Court declining to grant the statutory permission under section 33 (2) (*b*), proviso, another dispute was raised on behalf of the employee, in the same situation or context, because the employee had not been further employed by the management It would seem that this eventuated in a different reference to the Labour Court, which again went into the merits, and held that the non-employment of the employee was opposed to industrial law. A second writ petition was sought to be instituted by the management with regard to this decision of the Labour Court, but, admittedly, it was not pressed home, and it failed Learned Counsel for the respondent (employee) raised an argument, more or less of a preliminary character, that since the Labour Court had subsequently held that the threatened dismissal was improper, the writ appeal itself would not lie. The argument is not tenable, for the simple reason that the writ appeal is limited in scope to the refusal of Venkatadri, J , to issue a writ a *certiorari* quashing the order of the Labour Court declining to grant permission under section 33 (2) (*b*) of the Act The scope of the appeal is thus restricted, and the subsequent events which might affect the employment or non-employment of the worker by the employer organisation are not relevant to the scope, nor do they affect it

The short and simple point before us is whether the employer organisation, in exercise of disciplinary jurisdiction and on the findings of a domestic tribunal, had any justification to proceed to dismiss this worker or employee "for misconduct not connected with the dispute" under section 33 (2) (*b*) of the Act.

This question must be answered very decidedly in the negative. It is true that as the learned Counsel for the appellant has pointed out, *M/s Iron and Steel Co* v. *Their Workmen*[1], is authority for the view that an Industrial Tribunal, in the case of an alleged dismissal for misconduct, does not act as a Court of Appeal, and substitute its own judgment for that of the management. But that very decision is authority for the view, equally, that there are certain grounds on which the Tribunal will have jurisdiction to decline to grant the statutory permission. For our purpose, it is sufficient to state that those grounds include 'any basic error' or where, on the materials, "the finding is completely baseless"

In the present case, we have been taken in great detail through the record. The actual charge is a very simple one, namely, that on 14th July, 1963, while the respondent was on duty as the Chief Booking Clerk in the theatre, he did not issue tickets at the Ladies Counter for the Matinee show It appears that three representatives of the Picture Owners, namely, M. G R Pictures, were then inside the booking counter, and, certainly, one of them asked the respondent to proceed inside the counter and to issue the tickets The respondent declined to do this, and, in his view, he had good reasons for the refusal to engage himself in that duty at that juncture. There were already two clerks, who generally functioned under the respondent who were issuing tickets at the Ladies Counter, and the respondent claims that he was standing outside, looking to the regulation of the crowd. He states that the Booking office was already crowded by the presence of the two clerks and the representatives, and that there was some confusion He feared that, if duties were hurriedly performed in that confusion, shortage of cash might occur, as they very often tended to occur, when tickets were sold hastily, and in the context of even slight disorder. Further, he claims that he was then having loose bowel movements and in indifferent health, and so for the time being he preferred not to engage himself in selling tickets at the Ladies Counter, and he so informed one of the representatives of the picture owners. This person seems to have made some complaint later to the Manager, on which action in disciplinary jurisdiction followed.

This, as far as we are able to gather, is the sum and substance of the record. The very words in Tamil which are ascribed to the employee, show that he made a decision on the spot not to follow the suggestion of the representative that he should sell tickets at the Ladies Counter, because he feared that the office was crowded, and that shortages of cash might occur. There is an explicit reference to this apprehension on the part of the employee These are the facts, and the only facts that have been established On these facts, can we conceivably sustain the finding that there has been 'misconduct' on the part of the employee, in the sense that there is some material, however slight, in support of that charge?

Now, 'misconduct' is a specific word, with a specific connotation. The learned Counsel for the employer organisation himself concedes that it cannot be mere inefficiency or slackness It is something far more positive, and certainly, deliberate disobedience of any order of a superior authority will be one species of misconduct. But the point here, as stressed by Venkatadri, J, is that there was no misconduct of any kind on the part of the employee, even if the management took the view that he was not as diligent in the performance of his duties at that time as he might have been The representative of the Picture Owners was not a person in authority over this employee, in any sense He was merely a third party who, no doubt, had an interest in seeing that the tickets were not sold in the black market, or issued freely without collection of the fee It may be that the representative made this suggestion, in good faith, because he was interested in seeing that there was the maximum sale of tickets at the Ladies Counter But equally, this employee might have made his own judgment of the situation, and felt that if he engaged himself in that duty in those circumstances, shortages of cash might occur, which will lead to future embarrassment and loss to the management Even if the judg-

1. (1958) S.C J 285 (1958) M L J (Crl) 266 A.I R 1958 S.C 130 at 138.

ment was not a correct one, this is not misconduct in any specific sense, or by any stretch of imagination.

We have perused certain Standing Orders, which appear to have been prescribed by managements generally, though it does not appear that this particular management has adopted this form of Standing Orders. The several species of misconduct are enumerated in these Standing Orders, and all of them amount to positive acts of wilful disobedience or positive acts of malfeasance, injury to property, insubordination, etc It is true that the management, in this case, probably felt that the representatives of the picture owners had to be humoured, for the simple reason that the management had to depend upon the good opinion or favour of the picture owners for supply of further pictures Had the management taken some action against the employee, short of an averment of misconduct, within the meaning of the Act, and warned him or censured him, conceivably there would be no room for interference. But, where the management takes the responsibility to level a charge of 'misconduct' which is the charge of some positive act, or of conduct which would be quite incompatible with the express and implied norms, of the relationship of the employee to the employer in such an organisation, there must be material in support of such a serious charge. Where there is no material whatever of that kind, this Court must necessarily interfere, on both the grounds which have been recognised in the Supreme Court decision earlier referred to, namely, 'basic error' and the fact that 'the finding is completely baseless or perverse.'

Accordingly, the writ appeal has necessarily to fail and is dismissed. We may add that this is a case in which, with considerable plausibility, it could even be argued that there has been victimisation of the employee, the material in support of the charge being so flimsy as to be almost non-existent In the interests of good employer and employee relations, it would appear to be highly desirable that action of such rigour, upon materials which may amount, at the highest to proof of mere temporary inefficiency be avoided in future The parties will bear their own costs.

R.M. — *Answered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

Ponnumuthu .. *Appellant**

v.

Krishnan Nadar and others .. *Respondents.*

Penal Code (XLV of 1860), *section* 378—*Theft—Purchaser of property from plaintiff in a suit—Delivery warrant and* attakshi *proving the possession of plaintiff—Presumption of official acts regularly and correctly performed—Complaint at the instance of purchaser—Sustainable.*

Evidence Act (I of 1872), *section* 114 *(Illustration E)—Public records—Maintained in the ordinary course—Official acts regularly and correctly performed—Presumption—Delivery warrant and* attakshi—*Possession—Presumption*

In regard to public records which are maintained with regularity in the ordinary course of routine they must be presumed to show official acts regularly and correctly performed until the contrary is proved

Where the delivery warrant and *attakshi* clearly recited that the plaintiff took possession of the property from the judgment-debtor and put the decree-holder in possession of the same, the plaintiff would be in possession of the property until the contrary was established. If possession had not been delivered through Court then of course it would be a different matter

* Cr.A. No. 835 of 1965. 7th December, 1967.

The purchaser from such a plaintiff would be entitled to maintain a complaint against the defendants in regard to an offence of theft committed against the property in his hands The fact that the defendants were still litigating about their rights in the appellate Court would not show that either they had right to possession or that there was no criminal intent on their part

Or the facts,

The offence of plucking fruits from the purchaser's lands was however not proved and hence the complaint was liable to be thrown out

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondents Nos 1 to 3, (accused Nos. 1 to 4) of an offence under section 379, Indian Penal Code, by the Court of the District Magistrate (J) Kanyakumari at Nagercoil in C A. No 54 of 1965 on his file (C C No 590 of 1965, Sub-Magistrate, Eraniel).

S Padmanabhan, for Appellant.

K. Swamidurai, for Respondents.

Calvin Jacob for Public Prosecutor.

The Court delivered the following

JUDGMENT —The appellant purchased two plots marked *H* and *H*-1 in S. No. 726 from one Johnson This Johnson filed a suit O S No. 211 of 1958 on the file of the District Munsif of Kuzhiturai and in the final decree the plots *H* and *H*-1 as shown in the plan Exhibit A-3 attached to that decree were allotted to Johnson's share The respondents herein were defendants 2 to 5 in that suit They were allotted a plot *J* in S No 726. The appellant preferred a complaint to the Sub-Magistrate, Eraniel, alleging that the respondents had removed fruits from a tamarind tree standing in plot *H*-1 The learned Sub-Magistrate held that the offence against the respondents had been made out and found them guilty But instead of sentencing them, he released them under section 4 (1) of the Probation of Offenders Act on executing a bond for Rs 100 to be of good behaviour for a period of six months An appeal by the respondents to the learned District Magisrtate of Kanyakumari succeeded and hence the complainant has filed this appeal.

The learned District Magistrate seems to have been of opinion that Exhibit P-3 which showed that possession of plots *H* and *H*-1 had been delivered to the appellant's vendor Johnson cannot be said to show that the complainant had possession because the complainant did not examine either the Amin who effected the delivery to speak to the fact of his having effected delivery or Johnson to speak to the fact of taking possession. He referred to *Ponnuswamy Nadar* v *Athi Nadar*[1], where it is observed that the delivery warrant and Attakshi clearly recites that the plaintiff took possession of the property from the judgment-debtors and put the decree-holder in possession of the same, and that in regard to public records which are maintained with regularity in the ordinary course of routine they must be presumed to show official acts regularly and correctly performed until the contrary is proved. He also referred to *Damodaram Namboothiri* v. *Ulahannan*[2], where in addition to the record of delivery of possession there was an admission by the accused which showed that the complainant had come into possession. In holding that in this case the plaintiff cannot be said to be in possession obviously because there is no admission in this case as in the case of *Damodaran Namboothiri* v *Ulahannan*[2], the learned D strict Magistrate has clearly ignored the effect of *Ponnuswamy Nadar* v. *Athi Nadar*[1]. The respondents did not examine any witnesses to show that notwithstanding the delivery of possession of plots *H* and *H*-1 to Johnson they were still in possession of the properties Until the contrary is proved, it must be held that Johnson took possession of plots *H* and *H*-1 and that possession passed to the complainant, that is, the appellant in this case The learned District Magistrate

1 (1958) 2 M L J 110 2 (1961) K L T 799.

has referred to certain other matters which are quite irrelevant—payment of Kist before the date of delivery in August, 1961 and the fact that the second appeal was pending in the High Court If in fact Johnson had actually took possession pending the second appeal, the respondents should be deemed to be guilty of theft as they would be guilty of removing certain movable properties from possession of the plaintiff The fact that they were still litigating about their rights in the High Court would not show that either they had right to possession or that there was no criminal intent on their part If possession had not been delivered through Court then of course it would be a different matter However nothing more need be said about this aspect of the matter because on the facts also the learned District Magistrate has come to the conclusion that there was no sufficient evidence to show that the respondents plucked the tamarind fruits This one finding is enough to throw out the complaint of the appellant and it was quite unnecessary for the learned District Magistrate to have gone on to hold in the face of the delivery receipt either that the plaintiff was not in possession or that the pendency of the second appeal would in any way have any bearing on the question of the appellant's possession With these observations the criminal appeal is dismissed

V S ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

PRESENT —MR JUSTICE P S KAILASAM

G. Gabriel .. *Petitioner**

v

The State Housing Board, Madras by its Chairman and another .. *Respondents.*

Public servant—Dismissal on two charges by a competent authority—Court finding that one of the charges had not been made out—Order of dismissal if becomes vitiated

Madras State Housing Board Act (XVII of 1961), *section* 18—*Servant of Housing Board obtaining a tenement on concession and parting with the same—Dismissal from service—Legality.*

Constitution of India (1950), *Article* 226—*Dismissal of public servant not contrary to rules—High Court cannot interfere merely because punishment is severe.*

Where a public servant has been dismissed on two charges, the mere fact that the Court finds that one of the charges had not been made out, would not vitiate the order if on the charge that is made out, the authority could and would have imposed the punishment It is for the Court to satisfy itself whether the authority would have passed the order on the basis of relevant and existing grounds.

The main function of the State Housing Board being providing housing accommodation, if a servant of the Board abuses his privilege by obtaining a tenement on concession and parts with the same in breach of the conditions on which it was given to him, and he is dismissed from service, it cannot be stated that the Board would not be justified in pleading that the servant was dismissed for "sufficient reason" within the meaning of section 18 of the Madras State Housing Board Act. It would also amount to misconduct and breach of departmental discipline

When the punishment of dismissal from service imposed on a public servant cannot be said to be contrary to the rules, the High Court, cannot interfere with the same merely because it is of the view that the punishment is severe.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the proceedings of the first respondent herein dated 26th November, 1965 and bearing No. B P M S.

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* W P. No 1996 of 1966. 12th December, 1967.

No. 1107 as confirmed by the proceedings of the 1st respondent in its No 10440/E4/65-1, dated 9th February, 1966 and the non-interference by the second respondent in pursuance of its Memorandum No 33697/HG Spl II/66-4 dated 4th July, 1966 and quash the said proceedings and made therein

V.S. Subramanyam, for Petitioner

G Ramaswami, for 1st respondent and *K. Gopalaswami*, for the Government Pleader, for second Respondent

The Court made the following

ORDER —This petition is filed by a Sevakar in the Madras Housing Unit for the issue of a writ of *certiorari* against the order of the Chairman of the State Housing Board dated 26th November, 1965 as confirmed by its order dated 9th February, 1966, dismissing him from service The petitioner was appointed as a Lascar in the City Improvement Trust on 7th February, 1958 He was confirmed as a Sevakar in the Madras Housing Unit on 14th February, 1961. On 26th August, 1959, the Board allotted a low cost tenement in C I T Nagar on a rental basis in terms of a lease deed dated 26th August, 1958 The petitioner was also allotted on rental basis, plot No 624, in pursuance of a memo issued by the State Housing Unit on 27th March, 1963, and the agreement between the petitioner and the Board for sale of this plot was executed on 26th June, 1964 The Board on coming to know that the petitioner had not conformed to the conditions of the agreement issued a show cause notice dated 23rd June, 1965 for having unauthorisedly let out apartment No 15 C, Model Hutment Road to one Gnanambal Subsequently a memorandum dated 25th August, 1965 was issued, and in this two charges were framed against the petitioner Charge No. 1 was that the petitioner had let out unauthorisedly apartment No 15-C, Model Hutment Road, allotted to him on a rent of Rs 13-50 to one Gnanambal on a rent of Rs 24. The second charge was that he had leased out unauthorisedly plot No 624, C.I T. Nagar allotted to him on hire purchase basis to another person in violation of the conditions of allotment The enquiry was conducted on 29th October, 1965 and subsequently a show cause notice as to why the petitioner should not be removed from service was issued on 4th November, 1965 On 26th November, 1965, the petitioner was dismissed by the Chairman of the State Housing Board An appeal to the State Housing Board was dismissed on 9th Ferbuary, 1966 The Government declined to interfere in the matter

In the lease-cum-sale agreement executed by the petitioner., Clause 4 reads as follows :

> "The lessee/purchaser would not be entitled to assign, sub-let or part with possession of the whole or any part of the property without the previous permission in writing of the lessor/vendor "

In his first explanation dated 2nd September, 1965, the petitioner admitted that he had given the house to Gnanambal In the written statement, he admitted that Gnanambal whom he had known well asked for the houe for some days as it was kept locked The petitioner out of pity gave the house but did not collect any rent He regretted that he did not obtain the permission from the Board and that it was his mistake and prayed that he might be excused. In the oral enquiry held on 29th October, 1965, the petitioner admitted that the statement he made on 2nd September, 1965 was correct The Chairman of the State Housing Board has referred to the statement of the petitioner in the first instance and subsequently at the oral enquiry, that he had given the apartment without the permission of the Board The Chairman of the Board may not be correct in having stated that in his written statement, the petitioner admitted that he had let out the apartment By 'letting out', the Chairman did not mean that the house was let out for hire, but it was only given for occupation The Chairman has stated that the petitioner has admitted the fact of his having let out the apartment both in his written statement and at the time of the oral enquiry, while his contention subsequently was that he had given leave and licence for her to be in the premises Though the first charge as framed against the petitioner is that he let out unauthorisedly the apartment, on his own admission,

it is clear that he permitted Gnanambal to stay in the house which amounted to parting with of possession without the permission of the Board which would be contrary to the agreement So far as the second charge is concerned, the petitioner cited two persons out of whom one was examined Regarding the charge of letting out plot No 624, C I T Nagar, the Chairman had acted on the statements given by persons who were in occupation of the portion The sub-lessees were not examined in the presence of the petitioner and statements recorded in the absence of the petitioner were taken into consideration for establishing the charge. So far as this charge is concerned, the petitioner did not plead guilty and asked for an enquiry which was not given. The statements taken in his absence were relied on without giving the petitioner an opportunity The petitioner had been denied a reasonable opportunity of meeting the charge and therefore this charge cannot be sustained. But the petitioner was rightly found guilty of having parted with possession of the premises No. 15-C Model Hutment Road, though it had not been established that it was let out for rent

It has been laid down by the Supreme Court in *State of Orissa* v *Bidyabhushan*[1], that the order of dismissal passed by a competent authority on a public servant cannot be interfered with by the Court if the order may be supported on any finding for which the punishment can lawfully be imposed. The mere fact that it had been held that one of the charges had not been made out would not vitiate the order if on the charge that is made out, the authority can impose the punishment The Supreme Court in a later decision reported in *State of Maharashtra* v. *B K Takkomore*[2] has affirmed the decision in *State of Orissa* v *Bidhvabhusan*[1], holding that it is for the Court to satisfy itself whether the authority would have passd the order on the basis of the relevant and existing grounds to the exclusion of irrelevant and non-existing grounds. On the basis of the charge that is made out against the petitioner, it cannot be stated that the authorities are not competent or would not have imposed the punishment awarded to the petitioner.

It was contended by Mr Subramaniam, learned Counsel for the petitioner that what is found against the petitioner is breach of certain conditions in the agreement *viz*, parting with possession of the tenement allotted to him and that would not amount to mis-conduct in the discharge of his duties which would justify his dismissal. Section 18 of the Madras State Housing Board Act, 1961 provides that the power to dismiss the servants may be exercised by the authorities mentioned in the section for breach of departmental rules or discipline or for carelessness, unfitness, neglect of duty or mis-conduct or for " any other sufficient reason ". The learned Counsel appearing for the State Housing Board admitted that though the rules regarding promotions, suspensions, dismissal etc., have been framed they have not yet been approved by the Government and as such have not come into force In the absence of such rules, the Court will have to consider whether the act complained of would amount to breach of departmental rules or discipline or carelessness, unfitness, neglect of duty or misconduct or " other sufficient reason ". The function of the State Housing Board is execution of housing and improvement schemes The petitioner availed himself of the concession shown to him and had taken the apartment at a concessional rate The agreement provided that he should not sublet or part with possession of the same It is also provided that he was to submit periodical statements about his being in occupation and that disciplinary action was also threatened in case of breach of the conditions of the agreement It was submitted that the breach of the conditions may be improper and may even be immoral but would not be a misconduct which would entail dismissal of the public servant. I am unable to accept this contention for, the authorities are at liberty to dismiss a servant of the Board for breach of departmental rules of discipline or for misconduct or for 'other sufficient reason' The main function of the Board being providing housing accommodation, if a servant abuses his privilege by obtaining a tenement on concession

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1 A I R 1963 S C 779

2 (1967) 2 S C J. 705 A I R 1967 S C 1353

and parts with possession in breach of the conditions, it cannot be stated that the Board would not be justified in pleading that the servant was dismissed for 'sufficient reason'. It may also amount to misconduct and breach of departmental discipline In coming to this conclusion, I am strengthened by the observations of the Bench of this Court in the decision in Writ Appeal No. 180 of 1963. In that case the Head Cashier of the State Bank issued a post dated cheque which was dishonoured The Court observed that the Bank in its own interest had imposed a code of conduct or etiquette upon its officers and the good name and the repute of the bank depended very much on the strict observance of these rules and if a responsible officers like the Head Cashier had private dealings, particularly borrowings with constituents of the bank, if he himself was permitted to issue post dated cheques which could not be honoured because of lack of funds in his current account, then the interests of the bank would be gravely jeopardised. Applying these principles to the present case, if a servant who is serving in the Housing Board whose duty is to provide for accommodation, abuses the concessions regarding houses which were given to him it can be said that he is indulging in conduct, adverse to the interests of the Housing Board. If a rule had been framed providing that an officer who commits a breach of the rules relating to the allotment of the house, he is liable to be dismissed, it would be perfectly valid. In the absence of such rule, it is for the Court to decide whether the servant was dismissed for any of the grounds under section 18 of the Madras State Housing Board Act I am unable to say that the reason given is not sufficient The parting with of possession contrary to the terms of the agreement would amount to misconduct within the meaning of section 18 of the Act.

Mr Subramaniam, the learned Counsel for the petitioner, submitted that the petitioner is a Sevakar and the punishment is very severe and out of all proportion to the breach of the conditions of which he was found guilty. He also submitted that out of the two charges framed, the petitioner will have to be exonerated of the second charge and even as regards the first charge, letting out for rent has not been made out and that it had only been proved that the petitioner had parted with possession and for this offence—if it can be called an offence—the punishment of dismissal from service is totally uncalled for. The learned Counsel may be right in his contention that the punishment is severe, but as pointed out earlier, this Court cannot interfere with the same as the punishment imposed cannot be said to be contrary to the rules Mr. G Ramaswamy, learned Counsel appearing for the State Housing Board also agreed that the punishment by way of dismissal is severe I have no doubt that the Board would take all these matters into consideration and may deal with the case leniently as they may deem fit. With these observations, the petition is dismissed There will be no order as to costs

V K. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

PRESENT :—MR JUSTICE P S. KAILASAM

K M Mohammed Ghouse & Co. .. *Petitioner**

v.

The Collector of Central Excise, Madras and another .. *Respondents*

Sea Customs Act (VIII of 1878), section 115—Transporting of contraband watches—Confiscation under section 115—Acquittal of the accused by the criminal Court—Finding of the criminal Court—If binding on the domestic tribunal (Customs Collector)—Customs authorities, if police officers

On the question whether the finding of the criminal Court that the accused did not transport or import contraband watches, because the statements were obtained from them by threat, coercion, compulsion and ill-treatment cannot be

* W P No 1130 of 1966. 20th December, 1967.

ruled out entirely as quite improbable or impossible, is binding on enquiries conducted by domestic tribunals (Collector of Customs in this case),

Held, that under the Sea Customs Act, the authorities are entitled to proceed to adjudicate and discharge the duties imposed on them under the Act without reference to the conclusion arrived at by the criminal Court If the order of the Collector of Customs was good and well-founded on evidence placed before him, it cannot be vitiated by an order of Magistrate passed in a separate criminal proceeding. The Customs Authorities are not police officers

Held, also that, from the circumstances of this case, it is clear that the wrist watches were loaded in the boat for the purpose of being taken to the shore, and the facts would establish that the conveyance was used as a means of transport Under section 115 (2), the conveyance is liable to be confiscated when it is used as a means of transport in smuggling of any goods, unless the owner of the conveyance proved that it was so used without the knowledge or connivance of the owner himself, his agent or person in charge of the conveyance.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order dated 23rd November, 1965 in No 100/65 (Customs appeal) on the file of the second respondent and to quash the said order.

N A Subramaniam, for Petitioner.

M. Kalyanasundram and *G. Ramaswami*, for Respondents.

The Court made the following

ORDER —This petition is filed by a firm carrying on export and import business at Nagapattinam for the issue of a writ of *certiorari* calling for the records relating to the order dated 23rd November, 1965 of the Central Board of Excise and Customs, Government of India, New Delhi, quashing the said order, in Customs Appeal No 100/65 confirming the order of confiscation of the boat by the Collector of Central Excise, Madras

For the purpose of facilitating transport and loading of its export cargo in ships which call at Nagapttinam Port and which are usually anchored about 4 miles from the shore, the petitioner was owning a boat The boat bears Registration No 12 in the Nagapattinam Port Office. On 29th June, 1963 the petitioner's boat was taken by Tindal Natarajan with the cargo for being loaded into "S S State of Madras". It is stated that evening the petitioner received information from the Central Excise Office that boat No. 12 belonging to the petitioner-firm had been seized by the customs authorities on account of its being involved in smuggling of wrist watches from the ship and that Tindal Natarajan and other boat crew had been arrested On 2nd July, 1963 a statement was recorded by the Customs Collector of Nagapattinam, from one Abdul Salam, one of the partners of the petitioner firm. The petitioner disclaimed any kind of knowledge or responsibility for the alleged offence and prayed for the release of the boat to him. The petitioner firm was served with a show cause notice on 20th November, 1963 from the Deputy Collector of Central Excise, Tiruchirapalli, wherein it was stated that 150 watches were found in its boat on 29th June, 1963 and the petitioner was asked to show cause why boat No. 12 should not be confiscated under section 115 of the Sea Customs Act, 1962 The petitioner sent a reply on 28th November, 1963 The first respondent passed an order on 19th August, 1964 finding that Tindal Natarajan and boat crew Subramaniam have transported the contraband watches and imposed a penalty of Rs 100 on each of them under section 112 (*b*) of the Act The first respondent also ordered the confiscation of the boat under section 115 (2) of the Act with an option to pay a fine of Rs 5,000 in lieu of confiscation and clear the boat Against the said order the petitioner preferred an appeal to the second respondent During the pendency of the appeal Natarajan, Tindal of the boat and Subramaniam boat crew, who were tried before the Sub-Divisional Magistrate of Nagapattinam, for

the offence of importing 150 foreign watches without a permit or license, were acquitted. The petitioner enclosed a copy of the order of acquittal to the second respondent with a letter dated 30th August, 1965 and prayed for the release of the boat. But the second respondent by an order dated 23rd November, 1965 upheld the order of confiscation under section 115.

In this writ petition, several contentions were raised It was submitted that the criminal Court having acquitted the Tindal and the boat crew after finding that the prosecution had failed to establish that they smuggled the watches, the Customs Authorities should have accepted the finding and held that there was no smuggling and released the boat. It was also contended that the Customs Authorities are Police Officers and therefore the statements made to them should not have been acted upon. On a consideration of the evidence adduced before him, the Customs Collector came to the conclusion that there was material for finding that both Subramaniam and Natarajan were concerned together in the act of receiving the contraband watches from the ship bringing them to boat No 12, concealing them therein and thus transporting them clandestinely to the shore For arriving at this conclusion, the Collector relied on the statement made by Subramaniam on 29th June, 1963 that the packets containing the watches were handed over to him by his brother-in-law Ramamurthi aboard the ship and that he took up the responsibility for transporting them clandestinely to the shore by the boat in question Natarajan also made a statement corroborating the statement of Subramaniam But Natarajan stated that no credence should be given to Subramaniam's statement One Thangaraj also made a statement implicating Natarajan by stating that the packets of watches were received by Natarajan aboard the ship, brought to the boat in quest on and kept therein. On the finding that the watches were smuggled from the ship to the boat for the purpose of transporting them clandestinely to the shore and as the boat was used as a means of transport, the Customs Collector directed its confiscation On appeal the finding of the Customs Collector was accepted. It was held that Natarajan, the Tindal of the boat, and Subramaniam the crew, were concerned in the act of receiving the contraband from the ship and concealing it in the boat which they were manning. As Natarajan, the Tindal, was in immediate control of the boat on behalf of the petitioner, under section 115 (2) of the Act, the boat in question was liable to be confiscated.

The main contention urged by the learned Counsel for the petitioner is that the criminal Court in a prosecution against Natarajan and Subramaniam found that the prosecution had failed and that the charges against Natarajan and Subramaniam were not made out The criminal Court was of the view that the version of the accused that they did not transport or import the watches and that the statements were obtained from them by threat coercion, compulsion and ill-treatment cannot be ruled out entirely as quite improbable or impossible However, the question whether the finding of the criminal Court is binding on enquiries conducted by domestic tribunals has been considered by the Supreme Court in *State of Andhra Pradesh* v. *Sree Rama Rao*[1], and in *R P. Kapur* v. *Union of India*[2] These decisions were considered by this Court in *Rangarajan* v. *State of Madras*[3], where it was held that a departmental enquiry against a Government servant can be initiated on the basis of certain facts even though the Government servant has been acquitted in a criminal prosecution on the same facts and that while a domestic tribunal will normally be bound to treat the decision of a competent Court as final and cannot purport to come to a different conclusion, on the same facts, it cannot be said that there is a complete prohibition against such tribunal coming to a different conclusion. This Court in *Krishna Chetty* v *The Collector of Customs Madras*[4] has held that the mere fact that the criminal Court has rejected the statement of the accused as not voluntary would not debar the Customs Authorities from acting on these statements. The

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1 (1964) 1 S C J 364
2 (1964) 5 S C R 431 A I R 1964 S C 787
3 (1967) M L J (Crl) 136 (1967) 1 M L J 146
4 W P No 461 of 1959

Court observed that if the order of the Collector of Customs was good and well-founded on the evidence placed before him, it cannot become vitiated by an order of a Magistrate passed in a separate criminal proceeding In *H L Modi* v *The Collector of Central Excise, Madras*[1] in a criminal prosecution the accused therein were acquitted, but the Customs Authorities found that on the materials placed before them, the offence had been made out The Bench held that the observations of the learned Judge who disposed of the Criminal Revision Case acquitting the accused, and the conclusion reached by him in the said revision case, would not affect the validity of the departmental proceedings which have the sanction of the Sea Customs Act. The view of this Court in *Rangarajan* v. *State of Madras*[2], was followed in *M K. Mohamed Hussain* v. *The Central Board of Excise and Customs, New Delhi*[3], *M. K. Meeran Sahib* v *The Collector of Central Excise, Madras*[4] The decisions cited above are clear authority for the proposition that under the Sea Customs Act the Authorities are entitled to proceed to adjudicate and discharge the duties imposed on them under the Act without reference to the conclusion arrived at by the criminal Court This point therefore fails.

It was next contended that the Customs Authorities should be deemed to be police officers and the statements made to them should not be admitted in evidence. A Full Bench of this Court in *Collector of Customs* v. *Kotumal*[5], following the decision of the Supreme Court in *Badaku Joti* v. *State of Mysore*[6], has held that the Customs Authorities are not police officers In Criminal Appeal No. 135 of 1966, the Supreme Court has observed that the contention that was put forth before the High Court that a confessional statement to the Customs Authorities was hit at by section 25 of the Evidence Act was not pressed before it in view of the decision in *Badaku Joti Savant* v *State of Mysore*[6], which was a case under the Sea Customs Act In view of the decisions of the Full Bench of this Court and the Supreme Court referred to above, this point will have to be rejected.

Lastly, the learned Counsel for the petitioner, submitted that it has not been proved that the conveyance, namely, the boat, was used as a means of transport in the smuggling of watches as the Customs Authorities seized the watches when the boat was stationary This contention cannot be accepted as the boat is a conveyance and was intended to be used for transporting the smuggled wrist watches. It is not necessary that the prosecution should prove that the boat was actually moving. From the circumstances it is clear that the wrist watches were loaded in the boat for the purpose of being taken to the shore, and the facts would establish that the conveyance was used as a means of transport Under section 115 (2), the conveyance is liable to be confiscated when it is used as a means of transport in the smuggling of any goods, unless the owner of the conveyance proved that it was so used without the knowledge or connivance of the owner himself, his agent or a person in charge of the conveyance Though the plea of the owner was that he did not know anything about the smuggling, there is no attempt to prove that the smuggling was without the knowledge or connivance of himself or the person in charge of the conveyance, that is, the Tindal Natarajan and the crew Subramaniam. The fact that Tindal Natarajan and Subramaniam were found guilty of smuggling by the Customs Authorities is not disputed. In the circumstances the order of confiscation is right and cannot be questioned.

The Writ Petition is dismissed No order as to costs

V M K. *Petition dismissed.*

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1 W A No 45 of 1959
2 (1967) 1 M L J. 146 (1967) M L J (Crl) 136
3 W P No 2121 of 1965
4 W P No 2437 of 1965
5 (1967) 1 M L J 408 (1967) M L J (Crl) 381 A I R 1967 Mad 263
6 A I R 1966 S C 1746

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction)

PRESENT.—MR JUSTICE K. S RAMAMURTI

Messrs Isherdas Sahni & Brothers by Partner V N Sahni .. *Plaintiff**

v

Rajah V Rajeswara Rao and others *Defendants.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), as amended by Madras Act (XI of 1964)—" Building " under the Act—Meaning of—If includes buildings leased along with fittings or fixtures attched to it—Lease of a cinema theatre along with furniture, electrical fittings, generator and stand-by projector—If governed by the Act as a lease of a " building ".

Civil Procedure Code (V of 1908), section 9—Commissioner of Police refusing to renew licence to run cinema theatre on the ground that applicant was not in lawful possession of the theatre—Remedy of aggrieved party—If can file civil suit to establish his rights.

There are several provisions in the Madras Buildings (Lease and Rent Control) Act, 1960 as well as the rules framed thereunder in 1961, which leave no room for doubt and lead to the clear conclusion that the " building " under the Act would take in the lease of a building along with the furniture, fixtures and the fittings in the same In the first place, it may be noticed that the definition of " building " in the Act is an inclusive one and it should be given the meaning or interpretation which would achieve the purpose of the Act and should not receive any restricted meaning which would frustrate the very scheme or object underlying a beneficial or social legislation of this kind, and would also exclude practically a major portion of the buildings from the purview of the Act. It must also be borne in mind that the Act applies to buildings let for residential as well as non-residential purposes and any restricted interpretation of the word "building" would almost exclude from the operation of the Act, all buildings let out for non-residential purposes The Act could be rendered inapplicable to all buildings let out for non-residential purposes if the definition of " building " should exclude fittings and fixtures kept or attached to the building though essentially for the use of the building

Thus, a "building" under the Act would include furniture, fittings, fixtures and other amenities intended for the tenant's more beneficial enjoyment of the building It will be making nonsense of the Act to say that if a building with furniture and electrical fittings and the amenities as provided in the Act and enumerated in the rules, is leased out, it is not a lease of the building The fittings and fixtures and the other amenities provided are related and are referable to, and only to, the particular use to which the non-residential building is proposed to be put

It is clear that the term "rent" is comprehensive enough and very wide and includes all payments agreed to be made by the tenant in respect of the enjoyment of the building and for all the amenities provided for the more beneficial and convenient enjoyment of the building In other words the fact that the landlord provides additional amenities will not make the premises any the less a "building" within the meaning of the Act and the payment of money any the less a rent

It is well settled that where the question is whether a tenancy is governed by the Rent Control Act, it is not competent to the tenant to bargain and agree to give up his rights under the statute, and that any attempt to get over that restriction in the matter of freedom of contract (so far as the tenant is concerned). Courts will not permit nor recognise the tenancy agreements cleverly couched in an attempt to evade or avoid the applicability of the Act These Acts are remedial measures, legislations conceived for the protection and welfare of tenants, to guard against unreasonable eviction and collection of excessive rents and the object of the legis-

* Civil Suit No 73 of 1967 22nd December, 1967.

lation will be easily frustrated and defeated if tenants are permitted to enter into contracts giving up the protection afforded to them under the Act That is the reason why in all these statutes we find the *non obstante* clause overriding any contract to the contrary In all such matters, Courts have scrutinised the terms of the tenancy and found out the true bargain between the parties, ignoring, if necessary, the particular stipulation and the language employed in the lease deed.

Thus, a statutory tenancy cannot, by an agreement, be converted to a mere contractual tenancy and in all these cases Courts will only look at the legal substance of the transaction and not the form alone In other words, Courts and tribunals will have jurisdiction to scrutinise the allocation of the rent, its *bona fides* and genuine character in relation to the actual facts and realities

The proper approach in determining whether the Rent Control Act would apply to a lease which could have plurality of objects, such as the enjoyment or use of the building as such and enjoyment of the machinery or fixtures as such as two distinct objects, is to ascertain the dominant intention of the parties in entering into the agreement

From a scrutiny of the lease deeds and the conduct of the parties in the instant case, it is clear that in entering into an agreement of lease with respect to a cinema theatre along with the furniture, electrical and other fittings, generator for generating D C. current and a stand-by projector for use in case of emergency, the dominant intention of the parties was to make a lease of the building The lessees are therefore entitled to the benefits and protection under the Madras Buildings (Lease and Rent Control) Act, 1960, in respect of this lease

The argument has no force that what was leased was not the building but a cinema business From start to finish it was merely a lease of the building and any business which the lessees carried on was their own separate independent business

[For detailed facts and circumstances under which it was so held see judgment]

Case-law discussed

A party aggrieved by the decision of the Commissioner of Police refusing to renew a licence for running a cinema theatre, on the ground that he was not in lawful possession of the theatre within the meaning of rule 13 of the Madras Cinema Regulation Rules, has a right to file a suit in the civil Court to establish his right to possession of the building, when the rival claimant in the proceedings before the Commissioner had denied such a right.

(Applicability of the doctrine of English law with regard to fixtures, to India, proper meaning to be ascribed to the term " furniture " in the Rent Control Act and in lease deeds and the true scope of section 6 of the Madras Buildings (Lease and Rent Control) Act, 1960, also discussed incidentally in the course of the judgment)

Civil suits to establish plaintiffs rights to a building.

N. C. Raghavachari and *M. C. Varadachari*, Advocates, for Plaintiff

A Jagannatha Rao, R. Ramamurthy Iyer, S Govind Swaminathan for *K V. Narasimha Rao, M Ramachandra Rao*, and Additional Government Pleader for Defendants.

The Court delivered the following

JUDGMENT —The main point that arises for decision in this case is whether the plaintiff (hereinafter called the lessees) are entitled to the benefits and protection under the Madras Buildings (Lease and Rent Control) Act, 1960 (referred to herein as the Act) as amended by Madras Act (XI of 1964), in respect of a building or a Theatre known as " Odeon Cinema " This Cinema theatre belonged to two brothers, the first and the second defendant in equal shares and the second defendant, since dead, sold his half share to defendants 3 to 5 under a registered sale deed, dated 14th October, 1966 As certain objections were raised concerning the rights of the plaintiffs to obtain a renewal of the licence under the Madras

Cinema Regulations, the Commissioner of Police, has been impleaded as the sixth defendant

The relevant facts about which there is no serious controversy may be stated The suit theatre which is now popularly known as "Odeon Cinema" belonged to defendants 1 and 2 and they were exhibiting pictures for several years in that theatre which was then styled as "Sagar Talkies" They had also obtained the requisite licence under the relevant Cinematograph Act, getting the licence renewed periodically. About the period April 1944-45 to April 1952, one Somasundaram Chetty was exhibiting pictures in this theatre either as a lessee or with the leave and licence of the defendants 1 and 2 (hereinafter referred to as defendants) The Sahni brothers, the seniors and elders of the present partners of the plaintiff's firm, Isherdas Sahni & Bros, who were refugees from Punjab negotiated for the lease of the said theatre for a period of five years, the negotiations took some concrete shape and the main terms of the lease were embodied in an agreement executed by the parties *i e.*, the defendants and one R. N Sahni (now dead) This was followed up by a regular lease deed, (with certain changes) Exhibit P-4, dated 3rd May, 1952, executed by the defendants and Karam Chand Sahini (who is also dead) representing the Sahni Brothers. Detailed reference will be made to the terms and conditions of the lease deed. It is sufficient to state at this stage that the lease was for a period of five years upto 30th May, 1957 on a monthly rent of Rs.4,250 with a right of renewal, at the option of the lessees, for a further period of five years Schedule B appended to the lease deed sets out the various items, machinery, electrical machinery, talkie equipment, fittings, furniture and other accessories which were covered by the lease The list is fairly exhaustive and detailed and mentions all the items. In paragraph 3-A of the lease deed, it is stated that out of the monthly rent of Rs. 4,250 Rs 2,000 was to be the rent for the premises and the building, Rs. 1,000 hire for the furniture and Rs. 1250 hire for the machinery, electrical fittings, accessories and the talkie equipment with a specific mention that the lessees wanted to take the talkie equipment as a "Standby" A sum of Rs 25,000 was paid by the lessees as advance stated to be as security for the articles hired to the lessees and that the advance of Rs. 25,000 shall be adjusted towards the rent and hire for the last six months preceding the termination of the lease. The several sub-clauses in clause 5 contain the lessees covenants Clause 5 (*e*) provides that alterations, improvements, additions to the building should be made by the lessees without causing damage to the building and that when they were so made, they would become fixtures of the building and that the lessees would not be entitled to remove them at the termination of the lease, but that the lessors should be entitled to the same without any liability to pay any compensation therefor. Clause (*f*) provides that the lessees shall take proper care of the furniture and other fittings, machinery, talkie equipment and accessories and that if any damage is caused to the same, except by reasonable use and wear, the lessees, shall replace the same or compensate the lessors for the value thereof. Clause 5 (*l*) provides that the lessee shall not dispose of or otherwise remove from the building (without the consent of the lessors) any of the furniture, electrical fittings, fixtures which existed in the building at the time of the lease or may be hereafter (meaning after the lease) be provided upon the premises in substitution thereof except the talkie equipment Clause 5 (*p*) provided that at the time of the determination of the lease, the lessees shall yield up the demised premises with the existing fixtures, electrical fittings, furniture, etc., set out in Schedules A and B appended to the lease or the substitutions thereof and that in default of doing so, the lessees shall pay Rs 300 per day on such default

It is unnecessary to advert to the terms of Exhibit P-2, dated 2nd April, 1952 which the parties put into writing when the lease was agreed upon, as the regular registered lease deed Exhibit-P-4 which was executed a month later embodies (with some modifications) in detail, all the terms and conditions of the lease, mentioned above It is important to advert even at this stage to the two projectors with talkie equipments; (1) "Simplex" Projector and talkie equipment which was no longer in use and referred to as stand-by equipment, and (2) "Westrex" Projector with

talkie equipment which was obtained under a hire-purchase agreement from Messrs Westrex Company even during the time of the prior lessee, Somasundaram. As a result of and as part and parcel of the lease deed, Exhibit P-4 it was agreed between the parties that the lessees should pay to the lessors the instalments of hire-purchase paid up till then to Westrex Company and that the lessees should also continue to pay the entire future instalments as and when they accrued due The substance of the arrangement was that so far as the Westrex Projector and talkie equipment were concerned, they are the properties of the plaintiffs On this aspect, it is sufficient to refer to Exhibit- P-1, dated 25th March, 1952, the letter passed by Somasundaram to the defendants, Clause 3 of Exhibit P-2, dated 2nd April, 1952, and Exhibit P-3 a letter, dated 5th April, 1952 passed by the defendants to the plaintiffs; Exhibit P-74, dated 4th September, 1952, a letter by the Westrex Company, India to the defendants, Exhibit P-90 a transfer voucher showing a cheque, dated 28th October, 1952 given by the plaintiffs to the defendants for a sum of Rs 7000 and Exhibit P-120 showing the instalments of payments made by the plaintiffs to the Westrex Company. By the end of 1954, the plaintiff became the full-fledged and absolute owners of this Westrex Projector and talkie equipment, they having paid to the defendants the sum of Rs 7,000 and the entire balance of instalments, to the Westex Company. Exhibit P-120 extract shows that the plaintiffs, in addition to the price of the talkie equipment, have spent and incurred several items of expenditure with regard to the change of lenses and other component parts making a total of Rs 59,500 towards the capital investment and expenses incurred under this head. Mr Govind Swaminathan, learned Counsel for the defendants fairly conceded that so far as the Westrex talkie equipment was concerned, the case could be dealt with on the footing that it belonged to the plaintiffs and that as per the conditions of the lease deed, the lessees would be entitled to remove and take them at the termination of the lease deed and that the lessors will not have any right or claim thereto.

To continue the narrative, the lessees took possession of the theatre and effected considerable improvements, spending large sums of money in connection with various items, interior decoration, electrical fittings, sanitary fittings, furniture, gates, etc. From the extracts of the entries all culled out from the account books, it is seen that the plaintiffs have invested about Rs 1,16,000 and odd under the various items.

			Rs Ps.
1	Amount paid by Westrex Equipment as per Hire-Purchase Agreement including Rs 7,000 paid to defendants 1 and 2 (Exhibit P-120)		36,024—1—0
	Amount paid to Westrex Company for other purchases like lenses, screen, etc	.	20,115—7—0
2	Fire Extinguishors purchased (Exhibit P-33)	..	723—4—6
3	Electric Fittings paid to G E C (Exhibit P-120)	..	4,758—5—0
	Modi & Modi for fans and other electrical fittings, etc. (Exhibits P-41, P-47 & P-48)	..	2,917—0—6
	Patel Electric Co (Exhibit P-62)	..	5,045—12—0
4	Interior decoration including ceiling	..	10,690—4—0
5	Sanitary fittings	..	2,255—0—0
6	Furniture Pen Workers	..	30,443—15—0
	Other furniture including office furniture	..	3,987—10—3
	TOTAL	..	1,16,960—11—3

The entire seating arrangement was changed and except for a few items, the entire furniture had been replaced by new furniture which the plaintiffs purchased from "Pen Workers" the furniture company, in Bombay. As observed earlier, the plaintiffs changed the name of the theatre from "Sagar Talkies" to "Odeon Cinema". In fact, even though the lease was executed on 3rd May, 1952, the

plaintiffs did not screen any picture in the theatre immediately, but took up the work of renovation, remodelling and improvement of the theatre, and it was only on 27th June, 1952 that the first show commenced in the theatre preceded by a grand opening ceremony on the previous day on 26th June, 1952.

In the initial stages of the trial, there was some controversy as to the exact date on which the plaintiffs as lessees, screened or exhibited their first picture in the theatre. The defendants' case was that the plaintiffs screened a picture called "Notch" on 2nd May, 1952 for a week. On the other hand, the case of the plaintiffs was that immediately after the lease transaction was entered into, they plunged into their work of remodelling, improving and renovating the theatre, that it was only after the entire work was complete that they had a grand opening ceremony on 26th June, 1952 by late Dr. M. V. Krishna Rao, the then Minister for Education and that the regular screening of the picture commenced only on 27th June, 1952 The evidence on the side of the plaintiffs is overwhelming and conclusively established that the opening ceremony function was on 26th June, 1952 and the first picture was screened only on 27th June, 1952. In the course of the arguments of learned Counsel for the defendants, I noticed that they did not seriously press this point. I will advert to the documentary evidence little later ; it is sufficient to state at this stage as a part of the narrative, that the plaintiffs effected vast improvements and renovation in the structural, seating and sanitary arrangements in the theatre, practically replaced the entire furniture with new seating and other facilities—*vide* also Exhibit P-166, the extract of the news in the Indian Express issue, dated 28th June, 1952 containing the news of the function and the substance of the Minister's speech and the compliments paid by him about the enterprising work of the plaintiffs. I may also add at this stage that learned Counsel Mr. Govind Swaminathan, more than once, conceded that the plaintiffs who were experienced in this business line in Cinema had made this theatre a first class one spending huge sums of money including air conditioning of the entire theatre at a cost of two lakhs and more

The plaintiffs exercised their right of renewal, for a further period of five years as provided in the lease deed (Exhibit P-4 , by their letter Exhibit P-21, dated 24th October, 1956. This was immediately followed up by the Exhibit P-122, dated 25th October, 1956, an agreement entered into between the parties to the effect that a new lease deed shall be entered into for a further period of five years with effect from 30th April, 1957 to 30th April, 1962, with an option for a further period of five years on the same terms provided a notice of six months is given by the lessees exercising their option on or before 31st October, 1961. This agreement Exhibit P-122 contained a clause that if the lessees put up an air-condition plant, the lessors shall have no claim or right thereto and that if the lessors were not prepared to pay the market value prevailing at the termination of the lease, the lessees shall be at liberty to remove the said air-condition plant In pursuance of this, the second registered lease deed, Exhibit P-124, dated 22nd April, 1957 came into existence. The main points in controversy centre round the effect and the operation of the terms and conditions of the second lease deed concerning the question of the character of the lease, whether composite or otherwise, and I shall refer to these matters in greater detail later. It is necessary, however, to emphasise that the terms of the second lease deed Exhibit P-124 are line by line verbatim reproduction of the first lease deed, Exhibit P-4, except the necessary change in the dates and the period when the lease would terminate. The curious feature that requires to be mentioned is that Schedule B of P-124 which sets out the machinery, talkie equipment, fittings furniture and other accessories is identical (without any change whatsoever) as the Schedule B appended to the original lease deed, Exhibit P-4, even though it is beyond controversy that the schedule in the second lease deed has no relation whatsoever to the conditions existing at the time of the second lease deed with regard to the furniture, with regard to the fittings, with regard to the electrical fittings, with regard to the sanitary arrangements etc. etc. Schedule B in the second lease deed is simply a mechanical parrot-like repetition. On the same day, the defendants had passed a

letter, Exhibit P-125, of crucial importance, to the plaintiffs, to the effect that item VI of Schedule B, meaning thereby, the stand-by talkie equipment, shall be retained by the plaintiffs, as their own, on the termination of the lease either in 1962 or on renewal in 1967 and that the defendants shall have no claim or right thereto after the termination of the lease The old furniture which existed in the theatre and which were removed at the commencement of the lease, were kept in some portion of the premises and were sold by the plaintiffs in the end of April, 1962 for a sum of Rs 1,400 *vide* Exhibit P-130, dated 26th April, 1962 and Exhibit P-131, dated 9th May, 1962 In the meanwhile, the plaintiffs exercised their option by their letter, dated 29th August, 1961 (addressed to the defendants claiming a renewal for five years from 1st May, 1962 to 30th April, 1967 and under Exhibit P-129, dated 7th April, 1962 the defendants agreed to the aforesaid renewal for a period of five years till 30th April, 1967 A regular lease deed, however, does not appear to have been executed between the parties in view of the fact that the defendants had taken legal advice which was to the effect that no registered lease deed was necessary for the period 1st May, 1962 to 30th April, 1967 and that consent by the defendants given in their letter, dated 7th April, 1962 to the renewal of the lease for five years, was sufficient.

The next event, is the sale deed executed by the second defendant conveying his half share in the theatre to defendants 3 to 5 under a sale deed, dated 14th October 1966 for a price of Rs. 3,70,000 (the sale deed has been filed but not marked as an Exhibit as all the parties are agreed that the sale was subject to all the obligations of the vendor in respect of the lease in favour of the plaintiffs Here again, it is necessary to mention an important fact (which again is a matter of admission by all the parties) that the schedule to this sale deed concerning fittings, fixtures, furniture, talkie equipment, accessories, etc etc , is a mechanical parrot-like repetition of the schedules in the two lease deeds, Exhibits P-4 and P-124 and that under the sale deed what is conveyed to the purchasers, as described in the schedule, is those old items only having no reference whatsoever to the actual factual position existing in the theatre on the date of the sale deed. The sale deed does not convey to the purchasers any possible right, if any, which the vendor may have in respect of the new furniture, fittings, accessories, renovations, fixtures, etc which the lessees had brought into the theatre at the time of the commencement of the lease in May, 1962 as well as subsequently thereafter. As a result of the sale and subsequent correspondence, the lessees have agreed to and have become liable to pay one half of the rent to the first defendant and the other half to defendants 3 to 5, with the result that defendants 3 to 5 have stepped into the shoes of the second defendant.

Last in the chain of events, is the attempt made by the plaintiffs to get the licence renewed by the Commissioner of Police with effect from 30th April, 1967, the time-limit under the renewed lease P-124 The Commissioner of Police informed the plaintiffs by Exhibit P-148, dated 27th February, 1967, that the renewal of the licence would be considered only if a fresh lease deed extending the lease period beyond 30th April, 1967, was produced and a copy of this communication was also sent to the Commercial Tax Officer, Madras, as well as the Chief Electrical Inspector of Government of Madras During this period, the plaintiffs took up the position that they were entitled to the protection under the Rent Control Act, that no lease deed as such from the lessors was necessary , while the lessors objected on the ground that the plaintiffs were not entitled to the benefits of the Rent Control Act The letters written by the lessees to the Commissioner of Police, Exhibits P-150, P-151, P-152, P-154, P-155 and P-156 contain the aspects stressed by them before the Commissioner of Police and how the defendants were objecting to the renewal of the lease as a result of which the Commissioner of Police finally refused to renew this licence under rule 13 of the Madras Cinemas Regulation Rules on the ground that the plaintiffs were not in lawful possession of the theatre The result was, that the plaintiffs were obliged to file the present action on 18th April, 1967, for establishing their rights as statutory tenants entitled to the benefits of the Madras Buildings (Lease and Rent Control) Act, 1960 and their lawful possession of the theatre within

the meaning of rule 13 of the Madras Cinemas Regulations Act and also for an injunction against the defendants restraining them from interfering with the plaintiffs' rights and enjoyment of the theatre.

It is not necessary to refer in detail to the written statements of the defendants. Their substantial objection is that the lease in question is a composite lease, not a lease of a mere building, within the meaning of the Madras Buildings (Lease and Rent Control) Act and that on the expiry of the lease in April, 1967, the plaintiffs were not entitled to any rights to continue in possession claiming rights as statutory tenants.

Before I proceed further, I may state one point (to clear the ground of some controversy which existed at the stage of pleadings). Learned Counsel for the plaintiffs accepted the position that the old furniture which existed in the theatre and which were removed by the plaintiffs were sold by the plaintiffs in the end of April, 1962, and realised a sum of Rs. 1,400 and that the statement in the plaint that the old furniture which were kept aside were removed by the lessors is not a correct statement. Again, the statement in the plaint that the stand-by equipment, Item No. VI, was not handed over to the plaintiffs under the lease deed is not quite correct. What had actually happened was that when in pursuance of the hire-purchase agreement, the Westrex projector was installed, the Simplex Projector had been dismantled and placed in a room in the theatre, and that was why it was referred to as stand-by equipment in the lease deed, and that that stand-by projector is not there now In other words, so far as the stand-by equipment was concerned, the plaintiffs had a legal right and could have used the same in case there was any occasion arising if the Westrex Projector should give any trouble. The senior partners *i e.*, the Sahni Brothers, Karamchand Sahini and Roshanlal Sahni are now dead and there is no question of the plaintiffs withholding the evidence of any material witness I may also refer to the Arc Lamps about which some stress was laid in the course of the evidence and arguments Arc Lamps is necessary for the projector and it will work only with D C. current For generating D C current, there is a generator, dynamo and an electric motor Instead of using the generator, the dynamo and the electric motor, for developing D C current, a rectifier can be used for converting A C current into D.C current. The defendants case is that this generator to which particular reference was made in the Schedule B appended to the lease deed was being used by the plaintiffs even when they were using the Westrex talkie equipment at the time when the lease deed, Exhibit P-4 took effect, and it was only several years later, that the plaintiffs began using rectifiers giving up the generator, the dynamo and electric motor The plaintiffs would, however, urge that all throughout right from the time the lease Exhibit P-4 took effect, the plaintiffs were using only rectifiers and never used the generator, the dynamo and the electric motor. It does not matter as to when exactly the plaintiffs started using the rectifiers in view of the fact that the schedule to the lease deed expressly takes in the generator carrying with it, the plaintiffs' rights to use the same if they liked and it is not the concern of the lessors, whether the plaintiffs used the generator and if so when.

It is not in dispute that by reason of the provisions of Madras Act (XI of 1964), the plaintiffs would be entitled to the benefits of the main Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), provided they establish that (1) they are "tenants" under that Act and (2) tenants of a "building" within the meaning of the Act. The definition of "tenant" includes any person who continues in possession after the termination of the tenancy in his favour "Building" is defined as meaning any building or part of a building or shed let or to be let separately for residential or non-residential purposes including any furniture supplied by the landlord for use in such building (unnecessary portions omitted)

Learned Counsel for the defendants relied upon the Bench decision of this Court reported in *Raja Chetty* v *Jagannadhadas*[1] what is known as Maharani Talkies case

1 (1949) 2 M L J 694 A I R 1950 Mad 284

—in support of the contention that the lease of the theatre in the instant case is governed by the principle of that decision and that the lease in the instant case is a composite lease to which the provisions of the Rent Control Act would not apply. In that case what was leased was the theatre and all the fixtures, fittings, cinematograph talkie equipment, machinery, furniture, scenery and things in, upon and above the said theatre specified in the inventory. The monthly rent and a hire was fixed at Rs 3,200 made up of (1) Rs 1,600 rent for the ground and superstructure, (2) Rs 800 hire of furniture and (3) Rs 800 hire of talkie equipment, machinery, fittings and fixtures. The lease also contained a clause that the lessees shall yield up and deliver to the lessors on the termination of the lease the demised premises together with the fixtures, fittings, talkie equipments, machinery, scenery, articles, etc. including the additions and the alterations, whether they may be lessors' or lessees' fixtures taking in all effects which shall be brought upon the said theatre in addition thereto or substitution thereof The lease was for a period of five years commencing from October, 1948 As the lessees committed default in the payment of rent in April, 1949 the lessors filed an application under the Rent Control Act for eviction of the tenant on the ground of wilful default in payment of rent. The Appellate Authority ordered eviction holding that the Act applied to the lease in question In an application for the issue of a writ of *certiorari* this Court set aside the order of the Appellate Authority holding that the lease was a composite lease and was therefore outside the purview of the Act. Before the Bench it was urged that the lease deed must be split up as consisting of three separate transactions (*a*) the lease of the ground and superstructure for Rs 1,600, (*b*) hiring of the furniture on a monthly hire of Rs 800, and (*c*) a hiring of the talkie equipment, machinery and fittings on a monthly hire of Rs 800 This argument was rejected by the Bench on the ground that this splitting of the rent in the lease deed was purely notional and nominal and was resorted to reduce the property tax liability and for other extraneous considerations and that the attempted division of the lease and separation of the rights was in highest degree artificial, never contemplated by the parties. The Bench ultimately held that the lease was not a mere lease of the building and furniture of the sort covered by the definition in the Act, but a lease of a land and building together with the fixtures, fittings, "talkie equipment", machinery, etc.

Learned Counsel for the defendants also relied upon the Bench decision of this Court in *Om Prakash Gupta* v *Commissioner of Police*[1] where in respect of a lease of a cinema theatre with the building, furniture and equipment under similar circumstances (Rajakumari Talkies case) the same view was taken by the Bench of this Court consisting of Rajamannar, C. J and Basheer Ahmed Sayeed, J following decision in *Raja Chetty* v. *Jagannadhadas*[2].

Learned Counsel also drew my attention to the Bench decision of the Andhra Pradesh High Court in *Venkayya* v *Subba Rao*[3] which dealt with the case of a lease of groundnut oil mill comprising besides the building thereon, the machinery, plant of considerable value installed in the building all being required and used for the purpose of manufacturing oil out of groundnuts and other oils seeds The Andhra Pradesh High Court applied the principle of the decision of this Court in Maharani Talkies case as well as an unreported Bench decision of the Andhra Pradesh High Court which dealt with a lease of a cinema theatre comprising the buildings, furniture and the equipment necessary for the exhibition of the films Reliance was also placed by learned Counsel for the defendants upon another Bench decision of the Andhra Pradesh High Court reported in *A N Shah* v *Annapurnamma*[4] in which again, following the Bench decision of this Court, it was held that a lease of a picture house together with furniture, electrical fittings and other items was a composite lease of the talkie house and cannot be split up as contracts of lease, contracts of

1 (1960) 2 M L J 50 I L R (1960) Mad 490.

2 (1949) 2 M L J 694 A I R 1950 Mad 284

3 (1956) An W R 1093 A I R 1957 Andh Pra 619

4 (1958) 2 An W.R 447 A I R 1959 Andh Pra 9

hire and that it was not a lease of a building within the meaning of the Act The items of properties leased as noticed in that judgment appear to be of the same pattern as in the case in *Raja Chetty* v. *Jagannathadas*[1]. The Bench was also of the view that the definition of the building includes only furniture and not "fittings" and therefore the lessee would not be entitled to the protection under the Act. In view of the Bench decisions of this Court, which are binding upon me, it is unnecessary to refer in detail to the decisions of other Courts in which a contrary view was taken I will only merely advert to the latest Bench decision of the Calcutta High Court in *D S. Jain* v *Meghamaia Roy*[2] in which it was held, following the earlier decision of the same High Court in *Kali Prasad* v *Jagadish Pada*[3] that the lease of a furnished and well-equipped cinema show house and the building, the furniture and the machines and the machinery etc, all constitute its essential and integral parts of the components, that they cannot be regarded separately or as distinct or different units, that they are all linked up together by the lease itself of the entire lease of the premises within the meaning of the West Bengal Premises Tenancy Act and the fact that different items covered by the lease deed belonged to different persons who granted the lease as joint lessors would not affect the applicability of the Act The West Bengal Act used the expression "premises" which, I think, does not make any difference. It is true that in both the Bench decisions of the Calcutta High Court, no reference was made to the earliest Bench decision of this Court in *Raja Chetty* v. *Jagannathadas*[1].

Even at this stage, it is necessary to refer to a recent unreported decision of Natesan, J, in Second Appeal No. 1544 of 1963 in which the learned Judge, after considering the precise scope of the Bench decision of this Court in *Raja Chetty* v. *Jagannathadas*[1] and the Bench decision of the Andhra Pradesh High Court in *A. N. Shah* v *A Annapurnamma*[4] held that a lease of a cinema theatre with all furniture, fittings (electric and otherwise) and accessories (without the talkie equipment) would be governed by the provisions of the Act as a lease of a building. The learned Judge has examined, in detail, the provisions of the Act and the Rules framed in 1960 for the purpose of fixation of fair rent as well as the principle of the decision of the Supreme Court reported in *Karnani Properties Ltd* v. *Miss Augustine*[5] which dealt with a case arising under West Bengal Premises Rent Control Act. In that case, S A. No 1544 of 1963, a cinema theatre known as Murali talkies situate in Arcot (North Arcot District) was leased for a period of five years and the lessor filed a suit in ejectment after the expiry of the period of five years and the question was whether it was a lease of a building governed by the Act or a composite lease coming within the principle of the decision in *Raja Chetty* v *Jagannathadas*[1]. As I shall presently show, the decision of Natesan, J. directly applies to the facts of the instant case and with great respect, I am of the view, that it lays down correct law and ought to be followed The fact that in that case the cinema theatre was situate not in a big city nor the fact that the monthly rent was fixed at Rs 200 nor even the fact that the items of furniture, electric fittings, fixtures, and other accessories are of less value or small in number cannot possibly affect the principle laid down therein I find it impossible to accept the summary suggestion of Sri R. Ramamurti Iyer that, that was a small theatre and that the principle in that case cannot furnish a proper precedent for the instant case It is needless to observe that that approach is a very dangerous and unsatisfactory way to appreciate the principles and the law laid down in that decision. After a detailed and careful scrutiny of the provisions of the Act and the Rules, the learned Judge has held that the fact that "building" in the Act has been defined as including furniture supplied by the landlord for being used in the building but not making any express reference to the fittings will not make any difference and that the lease of a building with the furniture and the fittings in such a building would undoubtedly be a lease of a building coming under

1 (1949) 2 M L J 694 A I R 1950 Mad 284
2 (1964) 68 Cal W N 1136
3 A I R 1953 Cal 149
4 (1958) 2 An W.R 447 · A I R 1959 Andh. Pra. 9
5. (1957) S C J. 177 · A I R 1957 S C 309.

the definition clause. There are several provisions in the Act as well as the Rules framed thereunder in 1961 which leave no room for doubt and lead to the clear conclusion that the building under the Rent Control Act would take in the lease of a building along with the furniture, fixtures and the fittings in the same In the first place, it may be noticed that the definition of " building " is an inclusive definition and it should be given the meaning or interpretation which would achieve the purpose of the Act and should not receive any restricted meaning which would frustrate the very scheme or object underlying a beneficial or social legislation of this kind, and would also exclude practically a major portion of the buildings from the purview of the Act vide *Jivabhai Purshottam* v. *Chhagan Karson*[1] It must also be borne in mind that the Act applies to buildings let for residential as well as non-residential purposes and any restricted interpretation of the word " building " would almost exclude from the operation of the Act, all buildings let out for non-residential purposes If I may say so, the Act would be rendered inapplicable to all buildings let out for non-residential purposes if the definition of the building should exclude fittings and fixtures kept or attached to the building though essentially for the use of the building Section 3 deals with vacancies arising of buildings. Section 3, sub-section (5) runs as follows :—

"If the building is required for any of the purposes, or for occupation by any of the officers specified in sub-section (3), the landlord shall deliver possession of the *building and the fixtures and fittings in or on the buildings*, in good tenantable repairs and conditions to the authorised officer, or to the allottee named by the authorised officer, as the case may be and the Government shall be deemed to be the tenant of the landlord, with retrospective effect from the date on which the authorised officer received notice under sub-section (1) or sub-section (2), the terms of the tenancy being such as may be agreed upon between the landlord and the tenant and in default of an agreeement, as may be determined by the Controller."

And the third proviso to sub-section (5) provides that the fair rent shall be fixed in accordance with the provisions of the Act or in such manner as may be prescribed. Section 4 which deals with fixation of fair rent provides that in the case of the fixation of fair rent for any non-residential building, allowance may be made for consideration of locality in which the non-residential building is situated, features of architectural interest, accessibility to market, nearness to the railway station and such other amenities as may be prescribed and for a purpose for which the non-residential building is used Reference may next be made to section 17 of the Act which prohibits the landlord from cutting off or withholding of any of the amenities enjoyed by the tenant What is important to note is the *Explanation* to that section which defines the expression " amenities " in the section as including supply of water, electricity, passages, staircases, lights, lavatories, lifts and conservancy or sanitary services The importance of electric lifts in this context must be borne in mind It is thus abundantly clear that there are several provisions in the Act which show that a building will include furniture, fittings, fixtures and other amenities intended for the tenant's more beneficial enjoyment of the building.

When we come to the Rules, the same inference follows. The Rules provide for various matters including the fixation of fair rent in which allowance has to be for the various amenities provided in the building, residential and non-residential. Rule 7 provides that when the authorised officer fixes a fair rent he must have due regard *inter alia* to the common amenities such as water, sanitation, water taps, electric points, fans, staircases etc This emphasises that a building under the Act would necessarily take in the electric fittings. *Explanation I* to rule 9 shows that the furniture, fittings and electrical fittings and other accessories are regarded as forming part of the building emphasising that what is leased is the lease of a building and not a composite lease as a lease of a building and a separate lease of the

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1 (1962) 1 S C J 97 (1962) 1 S C R 568 · A I R 1961 S C. 1491.

furniture, fixtures, fittings etc It is necessary to extract hereunder rule No. 10 and rule No. 13, regarding allowances that are to be made for amenities provided thereunder while fixing the fair rent

" *Rule* 10 —*Allowances to be made for amenities in respect of residential buildings* — When calculating the cost of construction of residential buildings, allowances shall be made for the following amenities in addition to those specified in section 4 (2)—

1. Air-conditioning ;
2. Side dados ;
3. Tube lights ;
4. Number of electric points ;
5. Fans ;
6. Plastic emulsion coating for walls ,
7. Compound walls ,
8. Gardens ,
9. Wells ,
10. Overhead tank ;
11. Electric pump for water ;
12. Flush-outs ,
13. Porch ,
14. Ventilators ,
15. Fixed wash basins ;
16. Fixed bath tubs ,
17. Playgrounds ;
18. Badminton Court and tennis Court ;
19. Additional stair-cases ;
20. Sun-breakers

Rule 13 :—*Allowances to be made for amenities in respect of non-residential buildings.* When calculating the costs of construction of non-residential buildings, allowances shall be made for the following amenities in addition to those specified in section 4 (3)

1. Air-conditioning ;
2. Lifts ;
3. Electric fans ;
4. Tube lights ;
5. Number of electric points ;
6. Fans ;
7. Ventilators ;
8. Electric pump for water ,
9. Flush-out ,
10. Fixed wash basins ;
11. Additional stair-cases;
12. Garden or vacant ground appurtenant to the building enjoyed by the tenant ; and
13. Usufructs of trees, if any, enjoyed by the tenant."

In arriving at the proper meaning of the word "building" the popular, fair and common sense meaning has to be given to that word as otherwise almost every building would get de-controlled If I may say so, it will be making non-sense of the Act to say that if a building with furniture and electric fittings and the amenities as provided in the Act and enumerated in the Rules is leased out, it is not a lease of the building The fittings and the fixtures and the other amenities provided, are all related and referable to, and only to, the particular use to which the non-residential building is proposed to be put Applying the tests propounded by the Supreme Court in *Uttamchand* v. *S M Lalwani*[1] to which detailed reference will be made later, in the instant case all the furniture and fittings were provided for the more beneficial enjoyment of the building and not for the more beneficial enjoyment of any other thing, *i e.*, either the stand-by cinema equipment or the generator, even assuming that they should be considered as independent of the building and distinct objects of lease like the lease of machinery of Dal Mill. In this context reference must be made to the decision of the Supreme Court in *Karnani Properties Ltd.* v. *Miss Augustine*[2] the principle of which has been applied by Natesan, J That case arose out of an application filed by the tenant for the fixation of fair rent under the West Bengal Rent Control Regulation The tenant was occupying one of the flats which contained a number of fans and plug points, and the tenant was also entitled without any additional charge to the consumption of electric energy for lamps, fans, oven for cooking, laundry and refrigerators. There were also lifts in the building to the use of which also the tenant was entitled. The landlord, in view of these many amenities, contended that the Rent Control Act would not apply to the tenancy in question. From the decision of the Rent Control authorities (to which it is unnecessary to refer) the matter went to the High Court which awarded relief in part and the landlord took up the matter to the Supreme Court One of the substantial points which was argued before the Supreme Court was that the West Bengal Rent Control Act did not apply to the premises in question In dealing with that question the Supreme Court pointed out that the definition of "the premises" (it is significant to note that the definition of "premises" in West Bengal Act is the same as in the Madras Act except in addition to the furniture, "fittings" also is included) is very wide and the fact that special amenities and facilities and conveniences were provided would not take the building out of the purview of the Act. The matter was put in these terms at page 312 :

> "Under this head the question reduces itself to this : whether if by a stipulation between the landlord and the tenant the landlord agrees to provide for additional amenities like electric power for consumption and such other facilities the case is taken out of the operation of the Act The Act is intended "to make better provision for the control of rents of premises". It has defined "premises" in very wide terms, as pointed out above Hence it is difficult, if not impossible to accept the contention that the Legislature intended the provisions of the Act to have a limited application, depending upon the terms which an astute landlord may be able to impose upon his tenants In order fully to give effect to the provisions of the statute, the Court has to give them the widest application possible within the terms of the statute. Having these considerations in view, we do not think that the supply of the amenities aforesaid would make any difference to the application of the Act to the premises in question."

After referring to the relevant decisions in England, it was further observed as follows:

> "Their Lordships of the Court of Appeal repelled the contention that the additional payment was not part of rent and held that the payment in respect of the additional amenities aforesaid was also part of rent within the meaning of the English Act which corresponds to the Bengal Act. Those English decisions are

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1 AIR 1965 SC 716 2. (1957) SCJ 177 AIR 1957 SC 309, 312.

authorities for the proposition that "rent" included not only what is ordinarily described as rent in an agreement between a landlord and a tenant but also payment in respect of special amenities provided by the landlord under the agreement between him and his tenant. The term "rent" has not been defined in the Act Hence the term must be taken to have been used in its ordinary dictionary meaning If, as already indicated, the term "rent' is comprehensive enough to include all the payments agreed by the tenant to be paid to his landlord for the use and occupation not only of the building and its appurtenances but also of furnishing, electric installations and other amenities agreed between the parties to be provided by and at the cost of the landlord, the conclusion is irresistible that all that is included in the term "rent" is within the purview of the Act and the Rent Controller and other authorities had the power to control the same. In view of these considerations we overrule the first contention raised on behalf of the appellant."

It is clear that the term "rent" is comprehensive enough and very wide, and includes all payments agreed to be made by the tenant in respect of the enjoyment of the building and for all the amenities provided for the more beneficial and convenient enjoyment of the building In other words the fact that the landlord provides additional amenities will not make the premises anytheless a "building" within the meaning of the act and the payment of money anytheless "a rent" within the meaning of the Act. From this decision it will be at once apparent and evident that unless it is a lease of a "building" the Rent Controller will have no jurisdiction to fix the fair rent for otherwise, the parties will be bound by the terms of the tenancy and if the tenant or landlord desires a revision of the rent either should only go to the ordinary Courts of the land to enforce his or their rights, if any. I am of the view that it is necessarily and clearly implicit in this decision of the Supreme Court, that provision for various amenities will not in any way affect the character of the premises, seeing that all those amenities are in relation to building only

I must next refer to the note of warning and the rule of law to be followed in the interpretation of and in giving effect to the terms of a lease entered into between a landlord and a tenant It is well settled that where the question is whether the tenancy in question is governed by the Rent Control Act, it is not competent to the tenant to bargain and agree to give up his rights under the statute, and that any attempt to get over that restriction in the matter of freedom of contract (so far as the tenant is concerned). Courts will not permit nor recognise the tenancy agreements cleverly couched in an attempt to evade or avoid the applicability of the Rent Control Act These Acts are remedial measures, legislations conceived for the protection and welfare of tenants, to guard against unreasonable eviction and collection of excessive rents and the object of the legislation will be easily frustrated and defeated if the tenants are permitted to enter into contracts giving up the protection afforded under the Act. That is the reason why in all these statutes we find the *non-obstante* clause overriding any contract to the contrary In all such matters, Courts have scrutinised the terms of the tenancy and found out the truth or the real bargain between the parties, ignoring, if necessary, the particular stipulation and the language employed in the lease deed. This aspect has also been emphasised in the decision of the Supreme Court referred to above, in which it was observed that (1) the question of the applicability of the Act cannot depend solely upon the terms which an astute landlord may be able to impose upon his tenants

In *Ramalingam* v. *Gurumurthi Reddy*[1] a Bench of this Court has pointed out that it was not open to a landlord to enter into a contract with the tenant bargaining for larger rights and greater privileges than those conferred under the act, *i e.*, the tenant cannot be bound by a contract involving a curtailment or deprivation of his rights under the Act

In England this aspect of the matter denying freedom of contract to the tenants to agree to forego rights under the Rent Restriction Acts has frequently come up for

1 (1954) 2 M L J 752

decision in various aspects, particularly with regard to furnished premises and tenancies in which the landlord undertakes to render services in addition to letting out the premises Reference may be made to the following statement of the law in 23 Halsbury, 3rd Edition, page 722, paragraph 1467 .

> "*Contracting out of the Acts.* A tenant cannot contract out of his rights under the Rent Restrictions Acts Thus he cannot bind himself to pay more than the proper rents. Similarly, so long as a statutory tenant remains in occupation he cannot by any contractual arrangement forfeit his rights to be protected, nor is it possible to incorporate into a tenancy a term which in effect provides a ground for possession if it is unconnected with the user of the premises Even if a tenant contracts to vacate the premises and later refuses to leave, the landlord cannot rely on the agreement but must show some ground on which an order for possession may be made under the Acts Where, however, the landlord and tenant agree that the tenant will vacate the premises at a future date and that the landlord will then pay the tenant for giving up possession, the tenant is entitled, if the landlord later repudiates the agreement, to enforce it, as the agreement is not void on the grounds of the public policy, or want of mutuality, or as an attempt to contract out of the Rent Restrictions Acts
>
> The parties cannot be prevented by any estoppel from relying on their rights under the Acts whether the estoppel, results from agreement or conduct, or, it stems, from a decision of the Court".

From this it is seen that a statutory tenancy cannot by an agreement be converted to a mere contractual tenancy, and that in all these cases Courts will only look at the legal substance of the transaction and not to the form alone It is sufficient if reference is made to the following decisions in England of vital relevance and significance to the instant case. I shall first refer to the well known case in *Welch* v. *Nagy*[1] In that case during the currency of a lease of a furnished premises the tenant bought the furniture from the lessor though that itself would not convert the tenancy into an unfurnished one during the currency of that lease (for the purposes of the Rent Restrictions Act) But after the tenancy terminated and a new tenancy supervened and at a time when the furniture belonged only to the tenant by reason of his prior purchase, the landlord having no claim thereto, the tenant however proceeded to recognise the tenancy as one of a furnished dwelling house The tenant also wrote a letter to the landlord on that basis, *i e*, a tenancy of a "furnished dwelling house". It was held that a tenant cannot, by representing himself as tenant under a fully furnished tenancy when the house was in fact let unfurnished, confer jurisdiction on the Tribunals functioning under the Act The matter was put thus by Asquith, J. at page 464 :

> "The Rent Restriction Acts compel the Courts to treat an unfurnished lease of a dwelling house within the statutory limits of rateable value in a certain way. They are not to permit more than the standard rent and permit increase to be charged ; nor (except under certain conditions laid down in the Acts) have they jurisdiction to make orders for possession The Court must take these points even if the parties do not raise them, as they go to jurisdiction. The Court's power, on the other hand, to make orders for possession in the case of "substantially" furnished leases is left unfettered by the Rent Acts In my view the parties cannot by, describing whether by accident or design what is in fact an unfurnished tenancy as a furnished or substantially furnished one, alter the fact that the furniture is actually the tenant's and that such a tenancy cannot be furnished or substantially furnished one To treat the tenant here as estopped from denying that the tenancy is unfurnished when it is in fact unfurnished is to confer on the Courts by the act of one of the parties a jurisdiction (namely, an untrammelled power to make orders for possession of premises in fact unfurnished) which Parliament has said that the Courts shall not have"

1 L.R.(1950) 1 K.B. 455

Again at page 465 it is put thus.

"But when a new tenancy supervenes I see no reason why the Court should not have regard to the actual position as to ownership of the furniture, and if this is such that a furnished lease (let alone a substantially furnished one) is impossible, the Court must give effect to the rights which the statutes confer on a tenant under an unfurnished lease."

I may also refer to the following observations of Cohen, L.J., at pages 223-224 in *Regor Estates Ltd* v *Wright*[1]:

"Looking at the lease in the present case purely by itself for the reasons, I have given, I should come to the conclusion that it was an agreement for the payment of a premium so far as the £ 350 was concerned and not an agreement for the payment of additional rent. In dealing, however, with a matter of this class and the effect of a document relating to the Rent Restrictions Acts, we are not confined to the terms of the document, and we are bound to look at the transactions as a whole and consider whether it is within the prohibition of the Acts. In a different connection Uthwatt, J., made some observations in *Samuel* v *Salmon & Gluckstein Ltd*[2], in which he makes it clear that we are not bound by the vocabulary the parties have chosen to use. In that case he held that the premium was rent. The facts are obviously so far from the present case that we cannot gain anything by referring to them, but Uthwatt, J., said:

'Land may be leased for a consideration which is not a rent in law or for a consideration which consists of or includes a rent. The parties may write the agreement in such terms as they please and, if so minded, may attach any label they wish to the payments agreed to be made by the lease. But when all that is done, it is for the law to decide on the effect of the document what payments are rent reserved and what not. No label can create a fact, a label may accurately describe a fact or it may misdescribe it, or may help to the solution of a doubtful question of interpretation.' Counsel for the tenant referred us to the decision in *Rush* v. *Matthews*[3], where the parties had plainly attempted to evade the Rent Restrictions Acts by providing for weekly payments and calling them premiums in a separate document. On the facts of that case the Court had no hesitation in coming to the conclusion that there was a pure evasion of the Acts, within the mischief of the Acts, and therefore, the premium could not be enforced."

In the same volume, dealing with a similar aspect touching the freedom of contract in *R. M. R. Housing Society Ltd.* v *Combs*[4], Evershed, M.R. has given a note of warning that it would be possible to frame a clause which would render the Act wholly in operative in every case and that the Court will not countenance any such agreement as that would amount to enabling the parties to do indirectly and in an oblique manner what the statute says they cannot do directly. In England in applying the provisions of the Rent Restrictions Acts with regard to furnished and unfurnished premises the question of the rent bearing a legitimate and reasonable proportion, to the character and the nature of the particular furniture provided by the lessor and in what proportion the rent should be allocated to the building as such and in what proportion to the amenities by way of furniture has frequently come up for consideration. There again, decisions have uniformly held that neither the landlord nor the tenant can couch the stipulation and specify the allocation of a rent in the lease deed which is unreal or artificial with a view to get over and evade the provisions of the Act. In other words, it has been held that Courts and tribunals will have jurisdiction to scrutinise the allocation of the rent, its *bona fides* and genuine character in relation to the actual facts and realities. Again, whenever the landlord attempted to secure from the tenant payments (other than and in addition to the rent payable) by way of money or other consideration, Courts have negatived such right, despite the language in which the document may be couched. The landlord

1 (1951) 1 A.E.R. 219.
2 (1945) 2 A.E.R. 522.
3 (1926) 2 C.B. 492.
4 (1951) 1 A.E.R. 16 at p. 21.

had never been permitted to recover either money or other consideration from the tenant except the rent Vide 23 Halsbury, 3rd Edition, page 804, paragraphs 1583 and 1584

I may lastly refer to the decision in *Woods* v. *Wise*[1], in which the distinction between "rent" and "premium" under the Rent Restrictions Acts came up for consideration and as to how far, the Court can determine the real substance of the matter, whatever may be the language in which the parties had couched the bargain. Evershed, M R, at page 45 made the following interesting observation :

"I cannot for my part think that the arm of the law would be so short as to disable it from dealing appropriately with such a case as that last suggested, if it appeared that the so called premium was, in truth and substance, nothing more or other than the rent quantified and provided for in 'an abnormal form'."

The principles of these decisions will have a bearing in determining the allocation of Rs 1,000 as hire for furniture and Rs 1,250 as hire for the machinery and electrical fitting in the two lease deeds, and in particular with vital significance in the second lease deed Indeed Rajamannar, C J, in the Bench decision has observed that such an allocation is merely nominal and sham resorted to for collateral purposes, like property tax, and will not reflect the true bargain. While winding up the discussion of the English cases on this aspect of the matter, it is necessary to refer to the decision in *R* v. *Blackpool Rent Tribunal*[2], in which it was held that the landlord, merely by omitting all reference, to furniture in the tenancy agreement cannot prevent the applicability of the Act, when in fact it is the leasing of a premises with furniture There, Goddard, L C J, pointed out that a landlord by merely leaving some chattel in the premises could not convert that into a *dignified name of a piece of furniture*, and that the fact that the tenant had a right to use certain articles would not affect the matter.

The law is stated in these terms at page 902 :

"Two cases under this Act have previously been before this Court *R* v *Hamstead and St. Pancras Rent Tribunal, Ex Parte Ascot Lodge, Ltd*[3], and *R* v. *Croydon and District Rent Tribunal, Ex P Langford Property Co, Ltd*[4] Both cases were dealing with services, the provision of services having the same effect as the provision of furniture in giving a tribunal jurisdiction In those cases the Court laid down that the only question was whether the tenant was contractually entitled to receive the services from the landlord, and not whether the landlord, in fact, supplied the same as a matter of grace or convenience. In our opinion, it is quite possible that some different considerations may apply in the case of furniture For instance, the landlord, merely by omitting all reference to furniture in the agreement, could not prevent the tribunal acquiring jurisdiction, if in fact what was let was a furnished house, or to use the words of the Act, a house in consideration of a rent which includes payment for the use of furniture At the same time it by no means follows that what was ordinarily an unfurnished letting would be turned into a furnished letting because a chattel, which belonged to the landlord and could be dignified by the name of a piece of furniture, was left on the premises The question would be whether the letting was in consideration of a rent which included payment for the use of furniture".

From the above discussion it will be seen that while determining whether a lease governed by the provisions of the Act as a lease of a building or a composite lease the Court is not completely controlled or governed or bound by the terms of the lease. The Court, can, if necessary, and ought to scrutinise and ascertain the true bargain between the parties and as to how far an allocation or apportionment of the total rent under the several heads is genuine and has any true relation to the facts of the situation. If factually, no items exist which would make the lease a composite one

1 (1955) 1 Q. B 29
2 (1948) 1 K B 800.
3 (1947) 2 A E R 12
4 (1948) 1 K B 60

the truth will have to be ascertained ignoring the recitals in the lease deed. In other words (assuming not accepting), if furniture and fittings would make the lease a composite lease the question whether the furniture and the fittings actually existed as recited in the lease deed and whether they belonged to the landlord or to the tenant will have to be ascertained and also at the same time determine whether the recital of apportionment of the rent in relation to furniture and fittings was true. Again, if there is reference to the machinery or talkie equipment which would make the lease a composite lease, the same scrutiny and investigation should be made by the Court concerning the factual position

As the decision of the Supreme Court in *Uttamchand* v. *S M. Lalwani*[1], has a vital impact upon the facts of the instant case, I shall now refer to the same before dealing with the two lease deeds, Exhibit P-4 and Exhibit P-124 In that case the question arose whether the lease of a Dal mill building with fixed machineries and accessories would be a lease governed by the M P Rent Control legislation There too, the term " accommodation " was defined as any building including any furniture and any fittings affixed to such building (other portions omitted). The several clauses in the lease deed in that case showed that what was leased was the machinery and the accessories which were affixed in the Dal mill building and the schedules attached to the lease enumerated fifteen items all attached to the machinery, *i.e.*, Dal Mill The argument on behalf of the tenant was that the lease in question was mainly of the building, and that incidentally the lease took in the machinery and that the value of the building was far more than the value of the machinery It was also urged that subsequently, the machinery when found not in order was replaced at the cost of the lessee and that irrespective of the value of the building and the machinery, the dominant intention of the parties in entering into the transaction was not to enter into transaction in respect of the machinery as such but it was a transaction in respect of a building within the meaning of the Act The Supreme Court held that the proper approach is to apply the test of the " dominant intention " of the parties The Supreme Court observed that the fittings with the machinery could not be said to be fittings which had been fixed for the more beneficial enjoyment of the building but that they were all fittings for the beneficial enjoyment of the machinery It is significant to mention that the Supreme Court referred to section 3(*a*) (*y*) (*iii*) of the M.P. Act to emphasise that in the Act those fittings referred to are fittings for the more beneficial enjoyment of the building Elaborating this aspect, Gajendragadkar, C J, made the following observations —

> "What then was the dominant intention of the parties when they entered into the present transaction ? We have already set out the material terms of the lease and it seems to us plain that the dominant intention of the appellant in accepting the lease from the respondent was to use the building as a Dal Mill It is true that the document purports to be a lease in respect of the Dal Mill building ; but the said description is not decisive of the matter because even if the intention of the parties was to let out the Mill to the appellant, the building would still have to be described as the Dal Mill building It is not a case where the subject-matter of the lease is the building and along with the leased building incidentally passes the fixture of the machinery in regard to the Mill, in truth, it is the Mill which is the subject-matter of the lease, and it was because the Mill was intended to be let out, that the building had inevitably to be let out along with the Mill. The fact that the appellant contends that the machinery which was transferred to him under the lease was found to be not very serviceable and that he had to bring in his own machinery would not alter the character of the transaction This is not a lease under which the appellant entered into possession for the purpose of residing in the building at all ; this is a case where the appellant entered into the lease for the purpose of running the Dal Mill which was located in the building It is, obvious, that a Mill of this kind will have to be located in some building or another

1. A I R. 1965 S C 716

and so, the mere fact that the lease purports to be in respect of the building will not make it a lease in respect of an accommodation as defined in section 3 (a) (y) (3). The fixture described in the schedule to the lease are in no sense intended for the more beneficial enjoyment of the building The fixtures are the primary object which the lease was intended to cover and the building in which the fixtures are located comes in incidentally That is why we think the High Court was right in coming to the conclusion that the rent which the appellant had agreed to pay to the respondent under the document in question cannot be said to be rent payable for any accommodation to which the Act applies."

In applying the principle of this decision *i.e*, the theory of dominant intention, it may be noticed that in every one of these cases of these fixtures, fittings and amenities enumerated in the rules—*vide* rule 13 concerning non-residential buildings (whether fixed in the ground or to the building or otherwise) they are only for the more beneficial enjoyment of the building Surely, the building is not for the more beneficial enjoyment of these fixtures, fittings or furniture or other amenities like lift In my view, this doctrine of the dominant intention can come into play only where there can be a plurality of objects of a lease, *i.e*, the enjoyment or use of the building as such and the enjoyment or use of the machinery or fixtures as such, as two distinct (separate) objects One can visualise an oil mill, or a fertiliser factory a textile mill, or a soap factory, in all these cases we have the machinery or the fixtures, as well as the building which houses this machinery If there is a lease, in one case the parties may be particular about the building alone, the lessee may take the building, dismantle and throw away the plant and instal some other new plant, or the lessee may be keen only about the machinery or the plant, it being a rare machine imported from foreign country The building would have become old and dilapidated or the lessee may like to remodel the building so as to get the maximum use of this rare plant. The result will be that the dominant intention of the lessee while taking the lease would be to take a lease of this particular machinery or plant, his idea being to remodel or demolish the building and to put up a new one to house the machinery Such a conception of the lessee, being predominantly keen, upon one only, of the two things, the other being incidental or very subordinate is a necessary foundation for the applicability of this doctrine of dominant intention.

Let us take the instant case, the theatre building, the furniture and electrical and other fittings and the Simplex stand-by equipment and the Generator. At all stages of the discussion it is important to bear in mind, the crucial fact *i e.*, the main talkie equipment, the Westrex Projector, is that of the plaintiffs, and not covered in the lease deed at all. If that goes out it will be absurd and impossible to accept the contention that the lease of the building was incidental, and the idea, to use the stand-by equipment, in a remote contingency on the temporary failure of the Westrex equipment, is the dominant intention Let us next take the generator, *i e*, the motor and the dynamo, which cannot by any means constitute the talkie equipment There is one crucial aspect which has been overlooked in the course of the arguments of the defendants After all, the use of the generator, *i e*, the dynamo and motor, is to generate D C current to feed the arc lamp on the plaintiffs' Westrex Projector The plaintiff's case is, that they were not using the dynamo and motor but were using a rectifier right from the beginning The defendants have examined one Tukaram, D W 1 who gave evidence that in 1959 only the generator was removed as it went out of order, and that till then the plaintiffs were using the same. There is no specific pleading to thet effect and the crucial question was put by Counsel for the defendants in the form of a blatant leading question as to the year in which there was a cessor of the use of the generator When this witness was examined I formed the distinct impression that he had only hazy notions and could not give evidence with precision as to the dates or period when any particular event or events took place The answers elicited in cross-examination reveal the unsatisfactory features of the evidence of this witness This witness admits that the plaintiffs used a new arc lamp right from the beginning, *i e*, the Westrex arc lamp It is very likely and quite probable that the plaintiffs were using the rectifiers right from the beginning.

I am not prepared to accept the evidence of D W 1. But, for the present discussion, that does not matter Let me assume that the plaintiffs have been using this generator, dynamo and motor, for sometime, say five years 1952-1957 That does not improve the position of the defendants I find it impossible to accept the argument that a generator which was used or which could have been used for the effective enjoyment of the plaintiffs' Westrex Projector, (which projector, be it noted was not demised under the lease deed) would alter the character of the lease so as to take it out of the purview of the Act To put it in other words, if the generator was used or intended to be used, only in connection with the property of the plaintiffs to enable the plaintiffs to make a proper and efficient use of their property belonging solely to them, that cannot possibly take the lease out of the Act I have so far dealt with the stand-by equipment and the generator.

Then, what remain are only the furniture, fittings, fixtures, or amenities Under the Madras Act, read with the Rules, the items aforesaid have no independent existence, and they are by the statute regarded as amenities attached to the non-residential building In the face of such statutory provisions the question whether the intention was dominant or subordinate or incidental with regard to the furniture and the fittings will not therefore arise. Even if it should arise I am unable to hold that the old furniture and the old electrical fittings which were removed and thrown away would have constituted the predominant object of the lease, the building and other things being subordinate or incidental.

I shall now examine the two lease deeds I have already observed that the first screening of the picture by the lessees, plaintiffs, was only on 27th June, 1952, and that right from the inception, the idea of the lessees was to remodel, renovate effect improvements, completely renew the furniture, completely renew the electrical fittings and substitute all the accessories and also provide for convenient sanitary arrangements to make the theatre a first class one and then start exhibiting the picture. I find no substance whatsoever in the contention of the defendants that the plaintiffs screened the picture called "Notch' in the first week of May from 2nd May, 1952. They did not adduce any oral evidence and they only relied on Exhibit D-10, a letter from the advertisement department of the 'Hindu', to show that there was an advertisement dated 1st May, 1952 about the screening of the picture in Sagar Talkies from 2nd May, 1952. In the course of the cross-examination of P W 1, some questions were put suggesting that this picture 'Notch' was screened by the plaintiffs, which fact of course was denied.

The documentary evidence which has been adduced on the side of the plaintiffs is simply overwhelming and it is simply amazing how in the face of such over-whelming documentary evidence, and on such flimsy worthless evidence on their part, the defendants raised and persisted in this plea The documentary evidence consists of the plaintiffs' account books, the daily sales reports, box office sheets, which are all maintained in the regular course of buiness and the authenticity of which is beyond any question whatsoever They prove to the hilt, beyond any shadow of doubt that the first picture was screened by the plaintiffs only on 27th June, 1952 The first sales report, Exhibit P-164, commences from 27th June, 1952 Exhibit P-167, the certificate given by the Commercial Tax Officer also shows that the plaintiffs started paying entertainment tax from 27th June, 1952, (*from the date of the opening of the cinema—note the words*). This is corroborated by the box office statement, Exhibit P-168 commencing from 27th June, 1952, and Exhibit P-169, the bank book, entries at pages 212, 230 and 234 Reference may also be made to Exhibit P-180, the letter written by the plaintiffs to the Commissioner of Police as early as 30th June, 1952 in which it was stated that though the plaintiffs took possession of the cinema on 3rd May, 1952 the cinema was closed for renovation and decoration nearly two months from that date, and that the theatre was reopened on 27th June, 1952 about three days prior to the writing of that letter. The documentary evidence on the side of the plaintiffs is so overwhelming that I think it unnecessary to burden this judgment with a detailed reference to the same. The letters, Exhibit

P-75, dated 11th September, 1952 written by the defendants to the plaintiffs place the matter beyond any doubt, and I must say that it is very extraordinary, how in the face of this letter, this contention was raised and lot of time was taken in cross-examination merely making suggestions at random, at the same time the defendants not adducing any positive rebutting evidence This letter shows that an expenditure of Rs. 51-4-0 was incurred by the defendants towards advertisement charges of the proposed screening of the picture ' Notch ', that screening of the picture was stopped by the plaintiff and that the defendants should therefore be reimbursed. The records of the Police which have been produced in this case completely corroborate the plaintiffs' that there was no screening of the picture ' Notch ', by the plaintiffs. The police records also show that during that period the plaintiffs were taking steps to get a transfer of the licence in their favour, they had no licence in the first week of May, and secured it long afterwards.

Chitty Babu was then the manager of the theatre during that period He has been attending several hearings of this suit, assisting the defendants in the conduct thereof. He has not been examined. On two occasions when Counsel for the plaintiffs made reference to the presence of Chitty Babu, in Court and his non-examination, I noticed that this Chitty Babu, skulked away, to which fact, Counsel for the plaintiffs and myself made reference in the course of the hearing itself The advertisement report at the time of the opening ceremony of the theatre again show that there was a function on 26th June, 1952 and the first screening commenced only on 27th June, 1952. It is sufficient to refer to Exhibit P-166, the report in the 'Indian Express' dated 20th June, 1952 Apart from the inference to be drawn from the evidence adduced on the side of the plaintiffs, I do not see any reason why an adverse inference should not be drawn against the defendants for the non-examination of this Chitty Babu This non-examination is deliberate withholding and suppression of the evidence not only on this aspect of the case but on other aspects as well and becomes very significant when it is remembered that it is this Chitty Babu who was actively conducting the defence, much more than defendants themselves.

In view of this powerful evidence on the side of the plaintiff, I gained the impression that in the later stages of the argument learned Counsel for the defendants did not press this point with the same vehemence and insistence that prevailed in the course of the hearing Learned Counsel, Sri Govind Swaminathan fairly stated that the factual position has to be recognised that the first picture was screened by the plaintiffs only on 27th June, 1952 and that during the two months period the plaintiffs were engaged in the renovation and improvement work, as a result of which the plaintiffs made the theatre a first class one. Learned Counsel however submitted that even so, the legal position would not alter, because, the lease deed was executed and registered and took effect from 3rd May, 1952 and it was of no consequence to the defendants when exactly the plaintiffs started exhibiting the pictures in the theatre. That, that is the legal position is correct, but it has an important bearing on the question of the proper understanding of the terms of the lease and the main object underlying thereunder The entire furniture had been removed; the entire seating arrangement has been changed and costly furniture was purchased and brought down from Bombay The electrical fittings had been completely changed; lights and tube lights, electrical fittings, fans, fan points, light points have all been materially and substantially changed Here again except for a few small items it is a complete change over The other accessories, air cooler, fire extinguisher, advertisement tube lights, sanitary arrangement. etc were all substantially new only. There has also been significant additions and improvement to the building, changing the front elevation and the appearance of the theatre The senior partners of the plaintiffs are dead The first defendant could have given evidence about the state of affairs in 1952, thereafter but he has not been examined and I am not satisfied that there is any justification for not examining the first defendant The application to examine him (on commission) at the final stage, practically at the end or conclusion of the case, was merely an attempt to get over the charge of non-examination of the first defendant He is one of the main actors in this case in all the stages

and he ought to have been examined long ago. I have no hesitation in drawing the necessary adverse inference

That these alterations, substitutions, remodelling and renovations took place with the knowledge of the defendants cannot be disputed Indeed, learned Counsel for the defendants did not controvert that They would only have it, that, in the absence of direct evidence to that effect, it cannot be said that these changes took place with the acquiscence or the consent of the defendants, *i e*, proof of knowledge is not proof of consent or acquiescence I am unable to accept this contention No doubt, direct positive evidence of consent will be very satisfactory. But that does not mean the Court is to totally put aside the inference flowing from probabilities and the normal course of conduct and actings of parties for a long period Having regard to the long lapse of time, and death of all the actors on the plaintiffs' side, coupled with the non-examination of the first defendant, I think it will not be a wrong or violent presumption but a legitimate, reasonable presumption to make, that the plaintiffs must have obtained the defendants' consent, express or implied, and or there has been an acquiescence of the defendants, express or implied in respect of all these changes which the plaintiffs have made In this connection it should be noticed that the plaintiffs are refugees and as stated by learned Counsel, Sri Swaminathan, very experienced people in this cinema line Cordial and friendly relationship existed between the parties at that time, and I find it impossible to visualise a situation, that all these changes, would have been made by the plaintiffs, without any talk or conversation or exchange of suggestions and views between the parties, plaintiffs and defendants.

This inference based upon probabilities, I am adverting to, only to show that at the time when the lease was entered into, the plaintiffs must have told the defendants about all these aspects, the schemes and the ideas of the plaintiffs to completely renew the furniture, to completely remove the old electrical fittings and fixtures and make a complete substitution, even if the plaintiffs, did not seek the defendants' consent as such, for that purpose The crucial aspect which is necessary to be borne in mind, is that when the plaintiffs were negotiating for the lease and executed the lease deed, at the same time, and even at the threshold, they had decided to make all these changes regarding furniture, electrical fittings, fixtures, etc In that context, the inference is irresistible and lies on the surface, that the apportionment of the rent under the various heads Rs 1,000 hire for the furniture, Rs 1,250 hire for the machinery and electric fittings and the stand-by equipment is wholly unreal and artificial, and the test of dominant intention propounded by the Supreme Court completely supports the plaintiffs' contention

The stand-by equipment, had long ago been dismantled and this would not have happened if it could be of any service or use. The Westrex Projector is the plaintiff's own. The only use to which the plaintiffs could have put this "*stand-by equipment*" is on the contingency of the failure of the Westerx Projector which had been firmly fixed to the ground by bolts and nuts, and even if, the Westres Projector goes out of order, and could not be used, the stand-by projector cannot immediately thereafter be used The shows will have to be closed till such t me as the Westrex Projector is repaired and that is what the plaintiffs would first try to do Only if the repair work necessitates dismantiling of the Westrex equipment, only then, the stand-by equipment will have to be used, and that too, can be used only by fixing the same to the ground by bolts and nuts. In that contingency, the Westrex Projector will have to be dismantled; the stand-by equipment will have to be affixed by bolts and nuts For what period ? Till the Westrex equip nent is repaired. Again the Simplex will have to be dismantiled and the Wastrex affixed to the floor by bolts and nuts It is fantastic to say that for such a re ıote, far fetched speculative contingency, the plaintiffs agreed to pay a huge rent per month, or the plaintiffs seriously considered that it was necessary for using the theatre. I have said enough to show that both the parties, and the plaintiffs in particular, could not have attached

any serious significance to the stand-by equipment and the idea of their making use of it in the far-fetched contingency referred to above would never have been present in their minds at all Further, the letter of even date Exhibit P-125, passed by the defendants to the plaintiffs on the same date as the date of the second lease deed, Exhibit P-124 places the matter beyond any shadow of doubt, because under this letter the defendants have agreed that the plaintiffs themselves can take the stand-by equipment on the determination of the lease either in 1962 or after renewal in 1967, without the plaintiffs having to pay anything for this This circumstance I consider, is decisive and constituted powerful evidence to show that the stand-by equipment did not and could not have entered into the minds of parties and their scheme of things as a matter of any significance, and that reference to this "stand-by equipments" is made in the body of the lease deed and the Schedule, only for convenient apportionment of the rent, Rs 2,000 for one portion, for the buildings and the other portion, Rs 2,500 for other items, so that the latter apportionment would not enter into computation when the property tax is fixed or levied, as indicated by Rajamannar, C J., in the decision referred to already, "for tax and oblique purposes" Otherwise, there is no meaning in making such pompous reference to the stand-by equipment, as if, it is of some value and as an inseparable part and parcel of the lease agreement Exhibit P-124, to pass on the letter, Exhibit P-125 on the same date.

I have so far, discussed the matter on the basis that even at the inception the defendants were not only aware but had agreed to and acquiesced in the schemes and plans of the plaintiffs and the changes made by them to show that apart from the building, *i e*, the theatre, the parties did not attach much significance to the furniture, fittings and the fixtures and the dominant intention was only to take a lease of the building. My conclusion will be the same even if the true factual position were to be that the defendants had only knowledge of the plaintiffs' schemes, plans and vital changes made by them, there being no express or implied consent of the defendants thereto. Even this distinction of knowledge, as against consent and acquiescence, does not advance the position of the defendants

Repeated stress was made in the course of the arguments of the defendants that even if the plaintiffs did not intend to make any use of the stand-by equipment, of existing furniture, electrical fittings, etc. they would not affect the position so long as under the lease the plaintiffs had the legal right to use the same The question is not a legal right in the abstract, but the question of the dominant intention. The analogy of a motor car with a stepny tyre inside for use in emergency, which may not arise at all, but at the same time being of value and therefore always kept in the vehicle, though very attractive does not appeal to me in determining the true scope of the provisions of the Rent Control Act At the risk of repetition it has to be stressed that furniture, fittings and fixtures and the dynamo and the motor both under the Madras Act and the Rules framed thereunder and under the principle of the decision of the Supreme Court in *Karani Properties Limited* v. *Miss Augustine*[1] have to be held as forming part of the building If so, it necessarily follows, the inclusion of the stand-by equipment (about which I have elaborately dealt with) will not alter the character of the lease From the foregoing it has to be held that the lease, Exhibit P-4 of the year 1952 was not a lease of a *Fully Equipped Cinema Theatre* with *The Talkie Equipment* as of the kind dealt with in *Raja Chetty* v. *Jagannadadas*[2] the Bench decision of this Court

I shall now take up for consideration the second lease deed, Exhibit P-124 For the defendants it was urged that it is this second lease deed whih alone should form the primary and the sole basis for the decision in this case and the rights of parties should be decided on the basis thereof Even so, I am unable to see how

1. (1957) S C J 177 A I R 1957 S C 309 284
2 (1949) 2 M L J 694 A I R 1950 Mad

it improves their position; really the second lease deed makes the position worse and decisively against the defendants As observed earlier, though vital changes in every conceivable aspect of the theatre has taken place, all the clauses including the schedules in Exhibit P-124 are parrot-like mechanical, meaningless repetitions and reproductions. When the defendants had, at any rate, full knowledge of these vital changes, the wholly unreal and artificial nature of the retention of the B schedule in Exhibit P-124 is completely exposed If the Court were to act and rely upon this parrot-like reproduction which is totally divorced from and having no relation whatsoever to the realities of the situation, the decision of the Court will be completely devoid of human element and if I amy say so, it will not amount to a decision between human beings and upon their rights but a decision in a moot Court Further, the second lease deed is a complete answer to the arguments so repeatedly stressed that the Court should take into account not the actual user to which the plaintiffs put those articles but their existence in the theatre and the mere right to use them The situation in 1952 was totally different The furniture, fittings and the fixtures were alteast factually existing in the theatre then in 1952. But in 1957, the situation was completely different The old furniture had been removed and thrown away in a room Old electric fittings, wire, etc , had been removed and thrown away as rubbish The other fittings and fixtures and sanitary arrangements, everything had been changed, the old articles having no value whatsoever The old rotten electric wiring and fittings and other materials which have been thrown away as rubbish could not have possibly entered into the minds of parties as of any consequence when they reproduced Schedule B. It is meaningless to say that the apportionment of Rs 2,500 towards the hire for the furniture and the electrical fittings, etc , was made in the second lease deed for a mere right to use them, when the whole thing had not only been removed and or thrown away, but had also been completely substituted by the plaintiffs at huge cost It is unnatural in the extreme, even to speculate if there is room or scope for speculation that the plaintiffs would have agreed to pay Rs. 2,500 under this head for a mere right to use the items when they had put in new furniture and new electrical fittings at a heavy cost of their own That the old furniture was useless and was of no value has been proved by the fact that the old furniture despite the stiff bargaining fetched only Rs. 1,400 *Vide* Exhibits P-127, P-130 and P-131 These three documents contain reference to Chitty Babu and Venkataraman Venkataraman was the previous manager of the defendants and he should have been examined by the defendants There is no explanation for the defendants not having examined these two people I have no doubt that if they had been examined their evidence would have gone against the defendants The very fact that the sale was in 1962, seven years after the furniture was removed, shows that none of the parties attached any value to this furniture Every adverse inference will have to be drawn from the non-examination of these people It has to be held that neither of the parties attached any value to these old furniture, electric fittings and wirings The dismantled broken pieces of old sanitary fittings and other accessories would have been in the normal course thrown away as rubbish and they do not deserve, any special treatment here Indeed, I did not understand learned Counsel for the defendants making any point about the electrical wirings and fittings which were removed. I have already observed that there was no substance in the point stressed by Counsel for the defendants with regard to the stand-by Simplex talkie equipment as in 1952. Even assuming merely for arguments' sake that there is any substance in the argument, the same cannot be applied at the time when the second lease took affect, because of the contemporaneous letter, Exhibit P-125 passed by the defendants to the plaintiffs concerning this Simplex talkie equipment I have already dealt with this aspect holding that after Exhibit P-125 much value cannot be attached for the inclusion of the stand-by equipment in the lease deed, and that its inclusion in the schedule is only for collateral tax purposes.

On this, aspect, a purely legal argument in the abstract was advanced, that despite Exhibit P-125 the ownership of the simplex still inhered in the lessors and

that the plaintiffs would be entitled to take them only on the determination of the lease, and that till then, the defendants are the owners of the Simplex, and therefore the provision of appointment of the payment of a huge rent for the Simplex can be thus explained. This legal argument totally divorced from realities cannot be accepted.

There is another curious feature in the recitals in the D schedule under Exhibit P-124 They recite as though the identical pieces of furniture, electrical fittings, fixtures, and other accessories and sanitary arrangements are all factually existing and at the same time are all in the same place as they were at the time of the first lease in 1952 Everything has been changed from start to finish and the B schedule has no place whatsoever It will be sheer mockery to rely upon this schedule and to somehow fit the lease into the framework or the principle of the decision in *Raja Chetti* v *Jagannathadas*[1] When Schedule B with regard to the furniture fittings and fixtures, goes out, as unmeaning what remains is the building and the dynamo and motor, *i e.*, the generator I have already expressed my opinion that this generator, *i e.*, dynamo and motor, would be an amenity under the Madras Act and the Rules and their inclusion would not possibly make the lease a composite lease In view of the decisions of the Supreme Court in *Karnani Properties Limited* v. *Mis Augustine*[2], and *Uttamchand* v *S M. Lalwani*[3], and the fact that the Westrex talkie equipment belongs to the plaintiffs, the decision in Maharani Talkies case must be confined to the facts of that case Confronted with this factual situation of the meaningless, unreal and artificial Schedule B to the lease deed Exhibit P-124, learned Counsel for the defendants attempted an argument that by reason of clauses 5 (*f*), (*l*) and (*p*) of the First Lease Exhibit P-4, the entire new furniture, electrical fittings, fixtures etc , which have been substituted and brought into the theatre by the plaintiffs, have become the properties of the defendants and from this it is argued that the transaction should be understood as a lease of the building as well as all these items, furniture, etc , at any rate, from the date when the 2nd least Exhibit P-124 took effect There are various reasons why I am unable to accept this argument In the first place, there is no reference whatsoever to these new items in Schedule B It is not a case of there being no schedule at all, but there is the express Schedule B, items with pointed reference to the same in the body of the lease deed In the face of that, I do not know under what principle or rule of law, the present Schedule B should be completely ignored and thrown overboard and notionally substituted out-right by the new items for which there are no particulars even If that were the intention of the parties, that would have been mentioned in the second lease in the forefront and this meaningless Schedule B would not have been reproduced. How can it be imagined that at the time of the 2nd lease, the parties did not bestow any thought about the vital changes which had already been made by the plaintiff. The parties, deliberately, were not prepared to refer to the new furnitures new fittings etc., brought in by the plaintiff One reason is, the plaintiffs would nothave readily agreed to include all these items in the Schedule which meant, unequivocal recognition of the title of the defendants thereto and a negation or extinguishment of the plaintiff's rights thereto Further if the background and the circumstances under which and how the new things came into the theatre were to be mentioned, the Municipal Authorities may not accept this artificial apportionment of the rent. Secondly, the ready assumption of the learned Counsel for the defendants, that under the provisions of the first lease deed, the lessor, had become the owners of all these items, is wrong and lacks substance A proper interpretation of the several clauses of the lease deed, in particular clause 5 (*f*), (*l*) and (*p*) of Exhibit P-4, does not warrant any such view, as contended by the defendants The relevant clauses on which reliance was placed, may have to be extracted;

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1. (1949) 2 M L J. 694 . A.I.R 1950 Mad 284.
2. (1957) S C J 177 A I R 1957 S C 309
3. A I R. 1965 S C 716

Clause 5 (*f*) : The lessees shall take due and proper care of the demised buildings, furniture, and other fittings, machinery, talkies equipment and accessories and effects and keep them clean, in good repair and preserved from injury (except by accidental fire and from deterioration otherwise than by reasonable use and wear thereof) and as far as possible forthwith to replace with articles of the same sort and equal value such as may be lost, broken, worn out, damaged or destroyed (except as aforesaid) or to compensate the lessors in damages for any omission or replace as aforesaid and to repair and make good such articles as may be damaged (except as aforesaid)

Clause 5 (*l*) : The lessees shall not dispose of or let on hire or otherwise remove or suffer to be removed from the said buildings without the previous consents in writing of the lessors (except for the purpose of repair or alteration) and of the said fixtures, electrical fittings, furniture or any other articles or things of a like nature which may hereafter be brought upon the said premises in substitution therefor, except the talkie equipment.

Clause 5 (*p*) : To yield up the demised land and buildings with the existing fixtures, electrical fittings and furniture etc., described in Schedules A and B hereunder or substitutions therefor at the expiration or sooner determination of the said term in good and substantial repair and condition (fair wear and tear as hereinbefore provided only excepted) (Rest of this clause omitted as not relevant)

Clause 5 (*e*) deals with alterations and improvements to the buildings, under clause 5 (*f*) the lessees are to take proper care of the demised buildings, furniture and fittings keep them in good repair and replace whenever they are lost or destroyed or become useless by wear and tear. Such articles to be replaced are to be of the same sort and of equal value or in default the lessor is to be compensated in damages Loss or damage due to accidental fire and deterioration otherwise than by usual wear and tear is excepted. Clause 5 (1) restrains the lessee from dealing with these furniture, fittings etc , already existing in the theatre or the substitutions therefor. Clause 5 (*p*) enjoins the lessee to yield up to the lessor the demised premises with the existing fixtures, electrical fittings, furniture described in Schedule B or the substitutions therefor. I am of the view that the replacements of substitutions dealt with under these clauses are replacemnts or substitutions of articles of furniture which become useless or get damaged and worn out by ordinary use, wear and tear. The idea is that if some articles of furniture get damaged or worn out by use, wear and tear, the burden thereof should be borne by the lessees as the wear and tear is due to the use of the furniture during the currency of the lease and the lessors should not be made to suffer for that These clauses therefore would not apply to an out-right complete replacement of the entire furniture, fittings, fixtures etc , by the lessees. The use of words " the replacements must be of articles of the same sort and equal value such as may be lost or broken or worn out " emphasises this aspect. I shall make my meaning clear. Suppose the old furniture in 1952 consisted merely of ordinary chairs, ordinary benches and back benches and if the lessees removed all these items of furniture and replaced them by first class arm-chairs, with or without cushions, first class sofas etc., the lessors cannot claim these replacements at the time of the determination of the lease. At the same time the lessors, when the lease terminates, will be clearly entitled to call upon the lessees to replae those ordinary chairs, benches and back benches which existed in 1952 or to pay the value thereof at the prevailing rates on the date of the termination of the lease But the lessors have no right to ask the lessees to yield up these new items of furniture. The context in which the word ' substitution ' or ' replacement ' is used in the clauses of the lease deed tends to the same view. Further the restriction against disposal and removal as per clause 5 (*l*) is only about removal of furnitures, fittings, etc , which may be " hereafter " be brought upon the said premises, with the result that this restriction contained in the second lease deed, Exhibit P-24, cannot apply to the things which had already been brought in during the time of the first lease. The expression ' hereafter '

cannot possibly refer to furniture etc, which were already in the theatre at the time of Exhibit P-124. Again it is necessary to reiterate that the obligation to yield up and deliver as per clause 5 (*p*) is only with regard to the furniture, fittings and fixtures set out in Schedule B appended to the second lease deed. How can the lessors claim the lessees to deliver up, the items mentioned in its B Schedule and at the same time, claim the new furniture, fittings, etc, because of clause 5 (*f*), (*l*) and (*p*)? Obviously the lessors cannot claim both. The express reference and inclusion of the articles in Schedule B will necessarily exclude any right to the new items of furniture. If really the lessors thought that these clauses (*f*), (*l*) and (*p*) in the lease deed. Exhibit P-124, applied to the entire new furniture and fittings etc, they could not possibly have been blind or ignorant of their rights. The replacements or substitutions, according to them, had already taken place and it would have been easiest thing for the parties to have referred to all the new items in the place of the B Schedule, in the second lease deed of 1957. Absurdities, anamolies, want of cohesion between the first lease deed and the second lease deed have all arisen by the ill-drafting and by reason of the referene to the old B Schedule both in the body of the lease deed and the Schedules proper. When vital changes occurred in 1952, but yet significantly—and I must say deliberately—the parties avoided all reference to the new furniture, fittings etc, brought in by the plaintiffs, how can the defendants make any claim to items not included in the second lease deed? If the question as to what the relative rights of the parties (the lessees and lessors) with regard to the *old furniture, fittings* etc, as well *as to the new furniture, fittings* etc, had *been squarely posed and discussed* between the parties at the time of Exhibit P-124, it would have been of course differently worded. Again if the lessors thought that it was axiomatic that the new furniture, fittings etc, became the property of the lessors, they would have straightway referred to all these items in the Schedule B and omitted the old Schedule. Is it not clear beyond doubt that the lessors did not think that they had any right to the new furniture and fittings? Again even in the sale deed in favour of defendants 3 to 5 the new items are not mentioned. For all these reasons, I am clearly of the view that the clear intention of the parties was that the replacements and substitutions referred to in these clauses are the replacements and substitutions that would be made in the normal course when items of furniture and fittings become useless by wear and tear and not the wholesale substitution.

Further the argument of learned Counsel for the defendants overlooks that if at all any rights had accrued to the defendants under the several clauses of the lease deed in respect of the new furniture, electrical fittings, fixtures etc, they are incomplete and inchoate and will operate only by way of restraints and restriction against removal or disposal and will not control the effect of the recitals in the second lease deed.

I am not prepared to assume that when the lessees had spent about Rs. 1½ lakhs towards renovation, furniture, fittings, etc, they would have readily agreed to make a present of these items to the defendants. If I can speculate, I would rather think that if this question about these new additions had been squarely discussed the plaintiffs would have given up the idea of renewal and insisted upon their rights either for removal or to the compensation with regard to the new furniture, fittings etc.

Even assuming that all these new items ought to alternatively be handed over to the lessors at the determination of the lease, the ownership in these items will not however vest in the lessors during the currency of the lease. The several restrictions and restraints imposed upon the lessers under the several clauses of the lease do not make the lessors the owners of these items immediately they were brought into the theatre. The ownership therein will continue to vest in the plaintiffs till the lease is determined and they vacate. It is sufficient to refer to the principle of the decision of the Supreme Court in *Dr K A Dhairyawan and others* v *J R Thakur and others*[1]. That case arose under the Bombay Rent Control Act. The lessee

1. (1958) S.C.J. 1060. A.I.R. 1958 S.C. 789.

therein while taking the lease of the land from a temple for a period of 25 years at a rent of Rs 50 per month had agreed (as part of the lease arrangement) to construct within six months from the date of the lease certain superstructures, shops and residential rooms and hand over the land and the superstructures to the temple on the determination of the lease without any right to compensation The question directly arose as to the exact point of time when the ownership of these superstructures put up by the lessees vested in the lessors The Supreme Court held that the superstructures, right till the point of determination of the lease, belonged to the lessees, the clause in the lease did not transfer the ownership in the buildings to the lessors while the lease subsisted It was also held that the contract by the lessee in that case was a contract to the contrary within the meaning of section 108 (*h*) of the Transfer of Property Act. The Supreme Court also observed that there was no warrant for the view that the buildings erected by the lessee on the land would immediately vest in the lessors or that the same should be deemed to have been demised to the lessees along with the land The situation in the instant case is precisely the same Here, all the several restraints and restrictions would only amount to the lessees having waived their rights or having contracted not to exercise their normal right to remove the furniture etc, which they are entitled to under section 108 (*h*) of the Transfer of Property Act It is necessary to reiterate again that this reasoning of mine is only *on the assumption* that the clauses and the several restraints and restrictions would apply to the new furnitue, fittings etc In that context it must be borne in mind that but for the several clauses in the lease deed the new furniture etc, brought into the theatre and attached to the earth by the lessees could well have been removed by them as their own. The peculiar doctrine of English law with regard to fixtures in general and the classification of the fixtures as landlord's fixtures and tenant's fixtures do not apply in India. *Vide* Mulla, Transfer of Property Act, 5th Edition, pages 693-694 This difference in the aspect of the law in India has also been adverted to in the decision of the Supreme Court referred to earlier *vide* also *Venkatasubbiah* v. *Thirupurasundari*[1].

It was also argued that these new items of furniture had been firmly affixed to the earth, that when removed serious damage would be caused to them and that they could not therefore be strictly called furniture In support of this contention reliance was placed on the decision in *Palser* v *Grinling* and *Property Holding Co, Ltd* v. *Mischeff*[2]. It is unnecessary to deal with the decisions in England on this aspect in great detail which arose under the statutes in England I am clearly of the view that furniture under our Acts and in the lease deed in the instant case must be given its ordinary popular meaning An article within the ordinary description of furniture will not cease to be a furniture merely because it is affixed to the earth, and it is not necessary that furniture should always be movable though generally articles of furniture are commonly moveable I may in this connection refer to the following statement of the law in *Gray* v *Fidler*[3].

> " For myself, I hope that County Court Judges in cases of this kind, will never again think it their duty to decide as to each article whether it is a ' fixture ' or might, if it belonged to a tenant, be said to be removable as a 'tenant's fixture.' The word fixture is often loosely used, and not always with the same meaning. Its introduction into cases of this class serves only to confuse what should be a comparatively simple investigation The question to be decided is not one of law. The word furniture has no esoteric significance Expert evidence is not necessary to enlighten the Judge as to its meaning, nor ought he to be influenced by what other Judges have decided about other articles "

I am not prepared to hold that these new chairs, sofas and chairs are not furniture merely because they are fastened to the earth by bolts and nuts. All the items of furniture which were installed in the theatre are substantial ones, made, manufactured and intended to bear and withstand rough use and it is difficult to hold that

1 I L R (1965) 1 Mad 624. A I R 1965 Mad 185
2 L R (1948) A C 291
3. L.R (1943) 1 K B 694 at 713

such strong, sturdy furniture, specially made to withstand such rough use would be seriously damaged if removed. Even if for any reason they could not be regarded as furniture they would only be fixtures Even so, the lessee will be entitled to remove them and they will not become part of the leasehold property because, as observed earlier, the rules of English law do not apply. Even a petrol bunk installed in earth has been held to be not immovable property It is sufficient to refer to the Bench decision in *Mohammed Ibrahim* v *Northern Circars Fibre Trading Co* [1], in which the distinction was pointed out that even in the case of a machinery installed and attached to the land, the machinery will not become part of the land if the land and the machinery belonged to two different persons *Vide* also Mulla, Transfer of Property Act, 5th Edition, pages 23 to 27 Under the general law and under the statute (Transfer of Property Act) it is the undoubted right of the lessees to remove all the new fittings, fixtures, furniture etc , brought into the demised property. If any contract to the contrary, taking away this valuable right of the lessees, is set up, that contract, will have to be strictly construed and if there should be any ambiguity or doubt in the language used, it must be resolved in favour of the lessees. This well established rule in the interpretation of the lessee's covenants should also be borne in mind I am of the view that the several clauses deal only with the substitutions of items which would be damaged for usual wear and tear and would not apply to an out-right complete substitution It may be, that the lessees may be liable, to the lessors for having removed the entire existing items but it does not necessarily follow that these new items, even though they are more valuable will belong to the lessors. Further, the several clauses in the second lease deed refer only to old furniture and fittings and they will not amount to a contract to the contrary, within the meaning of section 108 *(h)* of the Transfer of Property Act, so far as the new items of furniture are concerned The contract to the contrary within the meaning of section 108 *(h)* of the Transfer of Property Act is only with reference to the items set out in B Schedule and substitutions and replacements made therein after 1957 after 1962

There is yet another aspect to which mention must be made Under the Madras Rent Control Act section 6 the landlord is prohibited from stipulating or receiving any premium or other like sum in addition to the rent in consideration of the grant or continuance or renewal of the lease This restriction is imposed to prevent landlords from circumventing the policy of the Act, namely, the charging of exhorbitant and excessive rents If the plaintiffs are entitled to the protection of the Rent Control Act at the time of the first lease in 1952 they are bound to pay to the lessors only the agreed rent and on the determination of the lease they would be entitled to remove all the new furniture, fixtures etc , brought in by them to the theatre If the several clauses of the lease deed, clauses 5 *(f)*, *(l)* and *(p)* are construed as a contract to the contrary the lessors would be getting in addition to the rent the value of the new furniture, fittings etc , to which in the normal course, the lessees will be entitled It is true that the section in terms refers to the bargain for the payment of any premium or like sum in addition, to the rent, and does not expressly deal with a bargain of this kind obliging the lessees to give up their right to the value of the lessee's fixtures and furniture But that cannot affect the legal position Virtually, what the lessors have bargained is extra payment of money representing the value of the lessees' fixtures at the time of the determination of the lease That would clearly come within the mischief of section 6 Any other view would completely defeat and evade the provisions of the Rent Control Act For instance while letting out the ground floor of a building, whether residential or non-residential, the landlord may stipulate that in addition to the rent, say Rs 200 per month, the lessee as part and parcel of the lease should agree to put up a building in the first floor at the cost of the lessee and hand over both the ground floor, and the first floor to the lessor on the determination of the lease, the lessee having no right of reimbursement or compensation for the expense incurred in putting up

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1 (1944) 2 M.L.J. 60, I.L.R. (1945) Mad. 304.

the first floor If this argument is to be accepted that this additional obligation is not in the nature of a payment of premium or additional sum in cash but something in kind or service, in every case the lessor would bargain for such consideration of an anomalous kind and impose onerous obligations upon the lessee, with the result that the beneficial object of the legislation would be completely defeated and frustrated. Reference has already been made to the statement of the law in 23 Halsbury, 3rd edition, page 804 paragraph 1853 in which this restriction under the English Rent Restrictions Acts had been applied not only to bargain for payment of an extra premium but also other obligations and covenants. The result is that these clauses in the lease deed to hand over to the lessors the new fittings, furniture etc, along with the demised premises would be inoperative and could not be enforced against the lessees in view of the provisions of the Rent Control Act.

I must also refer to another point repeatedly stressed in the course of the arguments, i e, what was leased was not the building but a cinema business, taking advantage of the use of such an expression in Natesan J.'s judgment as a ground of distinction I say that that observation was made in that case in a totally different context In the instant case there is no factual basis for such an argument. All the licences from the Police, Electricity Board etc, will have to be obtained by the lessees in their own names and they were acquired so by the plaintiffs. The plaintiffs completely changed the theatre and spent huge amounts for making it a first class theatre They did not, immediately, after Exhibit P-4 took effect, continue or carry on the business as an unbroken one. There was a time lag of two months, even the picture 'Notch' advertised by the defendants was not screened, and that programme was stopped by the plaintiffs Everything the plaintiffs did was on their own They did not take over anything like a stock in trade, cash in chest, cash in the banks or any outstandings or book debts or any other asset belonging to the lessors as a going concern The business was started, carried on and continued by the plaintiffs as their own, at their own cost and at their own risk with which the defendants had no concern There is no kind of connection whatsoever between the defendants and the plaintiffs in the matter of the business activities of the plaintiffs There is not even a question of the plaintiffs weaning away the customers of the defendants as in the case of other trades Failure or the success of the business depends and depended upon the business enterprise and the capacity of the plaintiffs in securing and arranging to exhibit good pictures yielding good income. Even in the matter of the staff there has been a change over There is only the single solitary fact that the defendants were originally using this building as a cinema theatre and that the plaintiffs too are putting the building to the same use The position may pose a problem, on which I express no opinion, if along with a lease of the theatre, the plaintiffs had also taken over any outstanding contracts for exhibition with distributors or producers entered into by the defendants or any other business commitments which the defendants might have already entered into long before and were pending at the commencement of the lease and also having operation subsequent to the lease, and at the same time the plaintiffs being obliged to continue and complete those commitments and transactions. Say for instance, if immediately prior to the lease, the defendants had entered into some distribution agreement for a period of two years with distributors on fixed hire or on a percentage basis for exhibiting certain pictures and had also received advances and as a part of the lease the plaintiffs had agreed to take up those transactions and the profit or loss accruing from the same. But there is no such feature in the instant case From start to finish it is merely a lease of the building and any business which the plaintiffs carried on was their own separate independent business. For all these reasons, I have no hesitation in rejecting this argument that what was leased was a cinema business.

Reference may also be made to another argument often stressed by Counsel for the defendants, that in judging the character of the lease the various items, furniture, electrical and other fittings, fixtures, stand-by equipment, generator

should not be considered independently in isolation, but all these items should be cumulatively taken into account That is what I have done Even so, I am unable to hold that it makes any difference or alters the character of the lease After the decision of the Supreme Court in *Karani Properties Ltd.* v *Miss Augustine*[1], and in view of the specific provisions of the Madras Rent Control Act and the Rules framed thereunder, particularly rule 13, it is futile for the defendants to contend that the furniture, fixtures and the fittings should not be taken along with the building. When the statute and the rules provide that they form part of the building and should be taken together into account in fixing the rent how can it be urged that these items should be considered separately? Such a perspective of approach will be directly contrary to the scheme and the provisions of this Act It is this identical aspect which has been pointedly brought forth in the unreported decision of Natesan, J Then what remains to be considered for this " cumulative theory ", if one may use that label, is only the generator and the stand-by equipment If the installation of electric motor and pump to facilitate supply of water in a furnished building (with all furniture and fitting) would not take the building out of the purview of the Act, I find it impossible to hold that the addition of a generator, dynamo and motor, to generate D C. current. would alter the character of the building Can it make any difference that in the one case in a furnished building with fittings, electric motor and the pump are provided for drawing water from the well by generating electric current while in the other case the dynamo and the motor are provided for generating D C, current for the arc lamp? Let us not forget in both the cases it is for generating electricity I find it impossible to hold that the addition of this generator would alter the character of the building I have already dealt with the significance of the stand-by-equipment Even if all these items are taken into account " cumulatively " the result is the same and would not alter the character of the building

It only remains to deal with the objection raised as to the maintainability of the suit and the award of the relief as prayed for by the plaintiffs in their plaint Learned Counsel, Mr Ramamurthy Iyer, contended that the question whether or not the plaintiffs were in lawful possession within the meaning of rule 13 of the Madras Cinema Regulation Rules should be considered and decided only by the Commissioner of Police, the 6th defendant herein, that it is his exclusive jurisdiction and discretion, and this Court cannot express such an opinion This argument was pressed with a certain amount of vehemence on the ground that the Bench decision of this Court which dealt with a cinema case, *Om Prakash Gupta* v *Commissioner of Police*[2] warrants that view This argument utterly lacks substance Learned Counsel has relied upon certain observations therein completely divorced from the context and the proceeding in which they were made. In that case after the termination of the lease, the lessee wanted the licence to be renewed by the Commissioner on the ground that even though the lease had terminated his possessory title was not only good as against everybody but good even as against the lawful owner, the landlord, that, till the landlord takes appropriate proceedings and recovers possession of the property from the lessee, the possession of the lessee must be held, as lawful possession within the meaning of rule 13 The Commissioner refused to accept this standpoint and the matter came up in a proceeding under Article 226 of the Constitution The argument before the Bench was that the Commissioner had misconceived his jurisdiction and that on the facts, the Commissioner should have held that the lessee's possession was lawful so long as the lessee had not been dispossessed by the lessor in a separate proceeding of his own It was argued all these facts *i.e.* the original grant of the lease, the termination of the lease, the lessee continuing in possession even thereafter, the absence of the lessor having taken any proceedings to evict the lessee, were more than sufficient to satisfy the Commissioner that the lessee's possession was lawful within the meaning of rule 13. That was the substance of the argument before the Bench which was not accepted. In the first place it must be noticed

1. (1957) S C J 177, A.I R 1957 S C 309 2 I L R (1960) Mad 490. (1960) 2 M L J 50.

that this Bench decision was rendered in a proceeding under Article 226 and not in a regular suit This Court pointed out the perspective of approach for defining the jurisdiction of the High Court under Article 226 with reference to the quashing of the order of the Commissioner under rule 13, the manner of its exercise by him and the materials the Commissioner can rely upon for the purpose of making up his mind as to whether or not the applicant was in lawful possession of the theatre. The Bench pointed out that the Commissioner had to make some enquiry and must have some materials on the basis of which he can exercise his discretion and pass order under rule 13, one way or the other The broad lines of the scope of the enquiry by the Commissioner of Police are discussed in page 53 of this Bench decision Ultimately the High Court observed that if the Commissioner of Police, at that stage, in a summary enquiry, under rule 13 had taken into consideration the relevant aspects and reached the conclusion that a particular party had not satisfied the Commissioner that the former was in lawful possession it was not within the province of the High Court under Article 226 to substitute its own view on the same material and interfere with the exercise of the discretion by the Commissioner. It is in that context the following observations were made by Rajamannar, C J.:

> " Here the rule expressly says that the evidence, which the applicant has to adduce to show that he is in lawful possession of the site, building and equipment, should be ' to the satisfaction of the licensing authority ' If an applicant produces certain documentary evidence, but the Commissioner is not satisfied, on such evidence that the applicant is in lawful possession of the site, building and equipment, he can refuse to grant the licence. Will it be open to this Court in the exercise of special jurisdiction conferred by Article 226 of the Constitution to say that the licensing authority should have been satisfied by the documentary evidence produced, as showing that the applicant is in lawful possession of the premises and equipment? There may, we concede, exceptional cases where this Court might hold that the order of the licensing authority is *prima facie* perverse. To give an extreme example: suppose there is a judgment of the Supreme Court, declaring that the applicant is in lawful possession of the premises and that judgment is produced before the licensing authority but the authority, nevertheless, says that he is not satisfied that the applicant is in lawful possession, this Court would interfere Barring such exceptional cases, we think that it does not lie within the province of this Court to examine the correctness of the view taken by the licensing authority in the case of each applicant as to whether he is or is not in lawful possession of the premises and equipment "

The limited purpose for which and the context in which these observations were made must be borne in mind. This Bench decision and the observations extracted above are not authority for the position that a party aggrieved by the decision of the Commissioner of Police has no right to file a suit and establish his right to possession of the building, when the rival claimant in the proceedings before the Commissioner denied such a right In fact, the pointed reference, to the instance of a decision of the Supreme Court which the Commissioner should take into account shows that the learned Chief Justice clearly recognised the right of an aggrieved party to get an adjudication in a civil Court. The decision of the Supreme Court on the right of the tenant is bound to be taken note of by the Commissioner of Police. It is absurd to suggest that a judgment of the High Court will not have the same effect The reference to the judgment of the Supreme Court is only illustrative. The substance of the observations of the learned Chief Justice is that the Commissioner of Police, while acting under rule 13 and exercising discretion is bound by the decision of a civil Court if such a decision is rendered as between competing claimants. In this case it is a statutory right In other cases, the dispute may arise on intestacy or upon rights flowing under a gift, or will or rights flowing under a sale deed, in all of which there may be controversy between the applicant and some other party and the Commissioner of Police may entertain an honest doubt under rule 13 about the merits and demerits of the rival contentions of the parties, and for that very reason may decline to issue the licence. In such a situation I am not able to visualise

what else could the aggrieved party do except to come to a civil Court and establish his right to the property. I do not understand learned Counsel for the defendants denying the right of the party to come to Court, in such situations I cannot see what difference it would make when it is a dispute with regard to right under a will or a gift deed or an intestacy or where it is a right arising out of the provisions of a statute. As I could not follow the argument which I found to be unintelligible I just put the following simple problem to learned Counsel of a particular situation of a landlord with half a dozen rowdies threatening the tenant that if the latter did not vacate the premises whether residential or non-residential within a certain time, say within a week, the landlord along with the rowdies would forcibly enter into the premises, throw away the articles of the lessee and take forcible possession of the premises I asked the question whether in such case, it would not be open the tenant to file a suit immediately and ask for a permanent injunction against the landlord and also a declaration of his rights under the statute, the right to continue in possession as a statutory tenant. Learned Counsel, Sri Ramamurthy Iyer, appeared to realise the untenability of the stand taken up by him and did not seriously pursue this line of argument. It is at that stage Mr. Jagannatha Rao, learned Counsel for the other defendants, said that his clients were seriously pressing this point but no further arguments were advanced by him. In the instant case it is beyond dispute, and not in controversy, that the defendants had disputed the claim of the plaintiffs. They successfully resisted the proceedings before the Commissioner of Police and consequent thereof, the plaintiffs failed in their effects to get a renewal of the licence from the Commissioner. The defendants assumed the same attitude in their interlocutory application, as well as in the suit. I am unable to see what more or what further was required to entitle the plaintiffs to file the suit in the case of this undoubted denial of the plaintiffs' rights. If the Court were to countenance to any extent, this contention of the defendants that the lessees will have no right to institute a suit the entire Act would be defeated by powerful and influential landlords who will take the law into their own hands, forcibly eject or push out the tenants and the latter will be without remedy. I have no hesitation in holding that the legal position is not so absurd. In my view the point is so basic, fundamental and established that I think it unnecessary to refer to precedents in which suits were entertained and declarations given upholding the rights of tenants like permanent rights of occupancy etc. I see no substance whatsoever in the objection that the pleadings and the reliefs prayed for do not cover the award of such relief of upholding the rights of the tenants under the Rent Control Act. From a reading of the plaint as a whole, with particular reference to the averments concerning the events which preceded the suit, I have no doubt that what the plaintiffs seek in the instant case is to establish that they are statutory tenants entitled to continue in possession of the property under the provisions of the Madras Rent Control Act, and that the building in question is a building within the meaning of the Act I find it impossible to hold that the main relief asked for in the plaint is to ask this Court to function as a Commissioner of Police exercising jurisdiction under rule 13. Such a contention is based on an incorrect understanding of the averments in the plaint and the substance of the reliefs asked.

On the findings reached I do not see any legal bar in awarding to the plaintiff reliefs in paragraphs 21 (1) and 21 (2). At this stage it is necessary to mention that the 6th defendant, the Commissioner of Police, was represented by Counsel who was present throughout the proceedings. Learned Counsel for the 6th defendant, even at the threshold represented to this Court on behalf of the Commissioner, that the latter has not any objections of his own, and that he would abide by the decision of the Court. All the objctions about the frame of the suit, which I have observed are useless and untenable, were raised only by Counsel for the other defendants and not by the Commissioner of Police. The correspondence which passed between the plaintiffs and the Commissioner of Police shows that there is no other question or objection and the only matter on which the Commissioner required clarification was whether the plaintffs could be deemed to be in lawful possession of the building within

Regulation Rules. Now that by this judgment this doubt has been cleared and clarified in favour of the plaintiffs by reason of their right to possession being upheld, the Commissioner will have to issue the licence to the plaintiffs as there is no longer any question arising for further scrutiny under rule 13 before the Commissioner. In other words this Court expects the Commissioner of Police to immediately implement the result of this adjudication and issue the licence to the plaintiffs.

On issues 1 and 2 it has to be held that the lease in favour of the plaintiffs is governed by the Rent Control Acts and that the plaintffs are entitled to the benefit thereunder In view of this, finding on Issue No. 2 is unnecessary. On issue 3 I find that all the items mentioned in the lease deed were handed over to the plaintiffs at the time of the lease in 1952 It is unnecessary to express a distinct finding on issue No 5 The plaintiffs have filed an extract showing the items purchased and the investment made by them All the items of expenditure and investment are vouched by the entries in the account books. It is only after culling out entries from the accounts that the extract had been prepared On issue 6 I hold that all the new items of furniture, fixtures and fittings as soon as they were installed or replaced did not form part of the lease Issue 7 I find in favour of the plaintiffs No such agreement has been proved by the defendants Issues 8 (*a*) and (*b*) I do not see any reason why the suit is not maintainable and why this Court has no jurisdiction I find the issues in favour of the plaintiffs. On Issue 4 I hold that the plaintiffs are entitled to contend that the items mentioned in the lease deed were not handed over to them or leased to them. There is no legal bar when the question is about the applicability of the provisions of the Rent Control Act. I have already referred to the decisions in which it has been held that if furniture had not been really supplied by a landlord the fact that it is so stated in the lease deed will not preclude the tenant from saying that such furniture was not supplied nor preclude the Court from finding out the truth *dehors* the recitals in the lease deed

The result is there will be a decree in favour of the plaintiffs against the first defendant and defendants 3 to 5 that the plaintiffs are statutory tenants under the Madras Rent Control Act and they are in lawful possession of the theatre and that they are entitled to be in possession of the theatre, Odeon Cinema There shall also be an injunction against defendants 1, 3 to 5 as prayed for in plaint paragraph 21 (2). There is no need to pass any formal decree as against the 6th defendant as his learned Counsel has agreed that the 6th defendant will accept and abide by the decision of this Court The plaintiffs will be entitled to their costs. The hearing of the case has been protracted and arguments were spread over for several days. I fix the costs of the plaintiffs at Rs. 7,000, Rs. 4,500 towards the Court-fee paid and Rs. 2,500 towards Counsel's fee and out fees. This decree shall be a joint and several decrees against defendants 1 and 3 to 5. In view of this the final order dated 28th April, 1967 passed by this Court in Application No 904 of 1967 appointing the plaintiffs' partner as Receiver and directing the plaintiffs to pay a sum of Rs 10,000 shall stand vacated and the plaintiffs are not liable to pay for the month of January 1968 and thereafter anything more than the original agreed rent of Rs. 4,500 per month.

At the time of the institution of the suit, the plaintiffs applied for and obtained interim injunction in Application No. 904 of 1967. After the defendants entered appearance and when the application was disposed of on merits, this Court by its order dated 28th April, 1967 vacated the interim injunction and appointed the plaintiffs, by their partner, V N. Sahni, as Receivers of the suit theatre and at the same time directed that a sum of Rs 10,000 should be paid by the plaintiffs, Rs. 5,000 to the first defendant and Rs 5,000 to defendants 3 to 5 at the same time mentioning that the said sum of Rs 10,000 shall not be accounted for in any way by the defendants. The order passed by this Court, sets out the reasons and the circumstances for passing the same I have held that hereafter the plaintiffs are bound to pay only the agreed rent of Rs 4,500 The plaintiffs are at liberty to pursue their remedies, if any, by way of restitution or otherwise for the excess payments which they have

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made in pursuance of the order of this Court in Application No 904 of 1967 while the matter was *sub judice* I do not express any opinion whatsoever about the merits of any such proceeding which the plaintiffs may initiate if so advised

V.K. ——— *Suit decreed*.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR JUSTICE M M ISMAIL.

Saradambal ... *Appellant**

v.

A.M. P Arunachalam ... *Respondent.*

Civil Procedure Code (*V of* 1908), *sections* 105, 108 *and Order* 21, *rule* 90—*Scope and applicability of—Sale of property in execution of mortgage decree—Petition to set aside—Application to dispense with furnishing security—Application of proviso to Order* 21, *rule* 90 *to mortgage decree—Dismissal of application—Direction to furnish security—Propriety of—Exercise of discretion when proper—Security insufficient—Dismissal of petition to set aside sale—Appeal against—Validity of order dismissing application to dispense with security, whether can be challenged in the appeal preferred against order dismissing petition to set aside sale—Security demanded earlier to admission of petition—Subsequent admission of petition does not take away Court's jurisdiction to test security.*

The second limb of the sub-section (1) of section 105 applies not only to non-appealable orders but also appealable orders which are not appealed against. This is clear from the language of the section itself. Apart from that, sub-section (2) of section 105 which provides an exception to the second limb of sub-sction (1) of section 105 states that any party aggrieved by an order of remand is precluded from disputing its correctness, if he has not preferred an appeal against the said order where such order is appelable Consequently the language of section 105 makes it clear that it is open to a party not to prefer an appeal against an order which is appealable under Civil Procedure Code and yet, to challenge its correctness in an appeal preferred against the final decree where that order has affected the decision of the case By virtue of section 108, Civil Procedure Code, provisions of section 105 will apply to a case of an appeal against final order also.

Held on facts that the appellant is entitled to challenge the validity of the correctness of the order, dated 14th November, 1963 dismissing the application of the appellant to dispense with the furnishing of security, in the present appeal preferred against the order dismissing his application to set aside the sale.)

Rule 90, Order 21, applies to every case where an immovable property has been sold—whether it is in execution of a mortgage decree or any other decree and the language does not warrant any distinction being made between the sale of immovable property made in execution of a mortgage decree and that in execution of any other decree In the case of a mortgage decree a proper exercise of discretion on the part of the execution Court will be to direct furnishing of security only if it comes to the definite conclusion that the value of the property will not be sufficient to cover the liability on the property, including the amount for which the property was sold. So long as the lower Court has not come to a positive conclusion on this aspect, it will not be exercising its discretion properly or legally if it directs the applicant to furnish security. (*Held* on facts, the lower Court was not justified in dismissing the application of the appellant to dispense with security and directing him to furnish security.)

Once security had been demanded earlier to the admission of the petition, the subsequent admission does not take away the jurisdiction of the Court to test the security permitted to be furnished already. (*Held* on facts, that the contention that by virtue of the order, dated 16th January, 1964 the lower Court had denied

* A.A O. No. 16 of 1965. 12th January, 1968.

to itself the right to insist on the compliance with its order dated 14th November, 1963 directing the petitioner to furnish security is not tenable)

Case-law discussed

Appeal against the order of the Court of the First Additional Subordinate Judge, Chingleput, dated 10th December, 1964 and made in E A No 15 of 1964 in District Court O S No 5 of 1963.

A Ramanathan, for Appellant

R. Rajagopala Iyer for *R Raghunathan*, for Respondent.

The Court delivered the following

JUDGMENT —The appellant herein who was the judgment-debtor in O S No. 5 of 1953, filed an application under Order 21, rule 90, Civil Procedure Code on 30th September, 1963 for setting aside the sale of the property that took place in execution of the decree in the suit and purchased by the respondent herein, and also filed an application for dispensing with the furnishing of security contemplated by the proviso to Order 21, rule 90, Civil Procedure Code I must mention the fact that the suit itself was based on a mortgage and the respondent herein who was the decree-holder purchased the property in auction for a sum of Rs 2,005. The application filed by the appellant for dispensing with the furnishing of security was numbered as E A. No 525 of 1963, the same was dismissed and the appellant herein was directed to furnish security for a sum of Rs 2,000 within one month from the date of the order, dated 14th November, 1963 The learned Subordinate Judge of Chingleput who disposed of that application stated that the point for determination before him was whether it was a fit case for dispensing with security to be furnished under Order 21, rule 90, Civil Procedure Code and then answered the point as follows :

> " On behalf of the petitioner, an affidavit filed by Valliammal in C M P No. 2194 of 1953 in C M A No. 127 of 1953, High Court, Madras, has been marked as Exhibit A-1 and in paragraph 5 of the said affidavit, it is alleged that the building was fetching a rent of Rs 500 per month Exhibit A-2 gives the value of the property at Rs 60,000 while according to Exhibit A-1, the four mortgage debts amounted to Rs. 35,000. It is contended that all the mortgages are old and have ripened to decrees and that no amount was paid, whether towards principal or interest, and that the property has deteriorated in value, and therefore security cannot be dispensed with On the materials placed before me, I find that it is a fit case to call upon the applicant to furnish security to the extent of Rs 2,000 and therefore the petition for dispensing with the security to be furnished under Order 21, rule 90 of the Civil Procedure Code, is dismissed with costs The time one month"

Thereafter the appellant furnished an extent of 72 cents of punja in S No 88/6 in Aviyur village, Gingee Taluk, South Arcot District as security. The respondent herein opposed it on the ground that the same was insufficient Thereafter, by an order dated 10th December, 1964 the learned Subordinate Judge of Chingleput held that the security offered by the appellant was not sufficient, that the same could not be accepted as security furnished in terms of the order in E A. No 525 of 1963, and that once the security was not furnished as called for, the application could not be maintained , and he consequently dismissed with costs the application E.A. No. 15 of 1964 filed by the appellant for setting aside the sale The present appeal has been filed against that order

Mr. A. Ramanathan, the learned Counsel for the appellant, advanced the following contentions.

1. The order dated 14th November, 1963 made in E A. No 525 of 1963 was erroneous on two grounds: (i) that the proviso to Order 21, rule 90, Civil Procedure Code, requiring the furnishing of security has no application to a mortgage decree, and (ii) that even assuming that it has application, the learned Subordinate Judge erred in demanding security on the facts of this case;

2 The order dated 14th November, 1963 made in E A No 525 of 1963 can be questioned by the appellant in the present appeal which has been preferred against the order dated 10th December, 1964 made in E A No 15 of 1964, and

3 On 16th January, 1964 the learned Subordinate Judge had admitted E A No. 15 of 1964 and consequently after the stage of admission he had no jurisdiction to demand security These contentions of the learned Counsel for the appellant are refuted by Mr R. Rajagopal Aiyar, the learned Counsel for the Respondent.

Logically I shall take the second contention first, because if I came to the conclusion that the appellant is not entitled to challenge the correctness of the order dated 14th November, 1963 in the present appeal, it will be unnecessary for me to go into the first question whether that order is correct or not The argument of the learned Counsel in this behalf is that the order dated 14th November, 1963 is merely an interlocutory order and it does not determine the rights of the parties; nor does it put an end to or terminate the application filed by the appellant for setting aside the sale According to the learned Counsel the dismissal of the application to dispense with the security will have only the consequence of compelling him to furnish security and only if he does not furnish security in terms of the order dated 14th November, 1963 his application for setting aside the sale would become liable to be dismissed. Therefore, the order, dated 14th November, 1963 is only an interlocutory order which can be challenged in the appeal preferred against the final order, dated 10th December, 1964. For this contention the learned Counsel relied on several decisions and the provisions contained in section 105 read with section 108, Civil Procedure Code. In *Maharaja Moheshur Singh* v. *Bengal Government*[1], the Privy Council stated:

> "We are not aware of any law or regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not so do, of forfeiting for ever the benefit of the consideration of the appellate Court No authority or precedent has been cited in support of such a proposition and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing, whereby on the one hand he might be harassed with endless expense, and delay, and on the other inflict upon his opponent similar calamities."

In *Chandrabala Debi* v *Prabodh Chandra Ray*[2], time had been repeatedly granted by the Court at the instance of the judgment-debtor with the consent of the decree-holders for compromise and on the final date to which payment was adjourned, the judgment-debtor prayed for further time and the decree-holder demanded it as a condition precedent to the grant of further time that the judgment-debtor should definitely agree that upon her failure to pay the money on the date to be fixed, her right to challenge the validity of the sale should finally cease. Notwithstanding this arrangement, the Court subsequently extended the time for payment of the money and permitted the judgment-debtor to deposit part of the decree amount on a particular day and gave her further time to pay the balance of the money. On the judgment-debtor complying with this order, the sale was set aside. Against the order setting aside the sale, the auction-purchaser filed the appeal. The question arose whether in that appeal the auction-purchaser could challenge the earlier order passed by the Court granting time to the judgment-debtor to pay the money. A Division Bench of the Calcutta High Court took the view that he could challenge the earlier order and he was not bound to prefer a separate appeal against the earlier order. The learned Judges pointed out:

1. (1865) 7 Moo. Ind. App. 283 at 302.
2. (1909) I.L R. 36 Cal. 422 at 429.

"In our opinion it was not necessary for him to do so As was pointed out by this Court in *Behary Lal Pundit* v. *Kedar Nath Mullick*[1], an appeal need not be preferred against every order in an execution proceeding If the contrary view prevailed, and if appeals were allowed to be preferred against interlocutory orders, there might be innumerable appeals in the course of one execution proceeding. It is open to the party aggrieved to challenge by an appeal against the final order which determines the rights of the parties, the propriety of the interlocutory orders made in the course of the proceedings."

These principles have been given statutory sanction in the form of section 105 Civil Procedure Code Sub-section (1) of section 105 provides

"Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal"

It may be observed that the second limb of the sub-section applies not only to non-appealable orders but also appealable orders which are not appealed against. This is clear from the language of the section itself Apart from that, sub-section (2) of section 105 which provides an exception to the second limb of sub-section (1) of section 105 states that any party aggrieved by an order of remand is precluded from disputing its correctness, if he has not preferred an appeal against the said order where such order is appealabe Consequently the language of section 105 makes it clear that it is open to a party not to prefer an appeal against no order which is appealable under Civil Procedure Code and yet to challenge its correctness in an appeal preferred against the final decree where that order has affected the decision of the case Mr. Rajagopala Iyer contended that the second limb of sub-section (1) of section 105 will apply only to orders against which an appeal lies and that too when the ultimate appeal is preferred against a decree and not against an order I have already pointed out that the second limb of sub-section (1) of section 105 applies to orders, whether appealable or non-appealable Otherwise, the observations referred to by me, in the decisions cited above, will have no meaning, because there can be no question of a party not being obliged to prefer an appeal against an order which is not appealable With regard to the second part of the objection of Mr Rajagopala Iyer, it has to be pointed out that by virtue of section 108, Civil Procedure Code, the provisions of section 105 will apply to the case of an appeal against final order also. In *Alagappa Chetty* v. *Annamalai Chetty*[2], Seshagiri Iyer, J , observes :

"I am inclined to think that the principle of section 105, Civil Procedure Code, would apply not only to decrees and interlocutory orders, but also to orders and interlocutory orders which lead upto the final order. The principles enunciated in *Jones* v *Gough*[3], and *Cameron* v. *Fraser*[4] to which Mr Rajah Aiyar on behalf of the respondent drew my attention support. this view."

This has been followed by Menon, J., in *W. Swaminatha* v *Narayanaswami*[5], The Supreme Court in *Satyadhyan* v. *Smt. Deorajin Debi*[6], after elaborately referring to section 363 of the Civil Procedure Code of 1859 and the corresponding provisions in the subsequent Civil Procedure Codes, and to section 105 of the present Code of Civil Procedure, stated:

"It is clear therefore that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken could be challenged in an appeal from the final decree or order."

In the light of these decisions, I am of the view that the appellant in the present case is entitled, to challenge the validity or the correctness of the order dated 14th

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1 (1891) I L R 18 Cal 469
2 (1916) 4 L W 411 at 413
3 (1865) 8 M P C 12.
4 (1842) 4 Moore I A (P C) 1
5 A I R 1936 Mad 936
6 A I R 1960 S C 941 at 946

November, 1963 dismissing the application of the appellant to dispense with the furnishing of security, in the present appeal preferred against the order dismissing his application to set aside the sale The learned Counsel points out that in the grounds of appeal preferred to this Court he has challenged the correctness of the order dated 14th November, 1963 In this connection Mr Ramanathan, the learned Counsel for the appellant, invited my attention to the decision of the Travancore-Cochin High Court in *Mohamad Ali* v. *Abdul Rahiman*[1] In that case the execution Court declared that the decree-holder was entitled to interest on mesne profits awarded to him by the decree, though the decree itself did not make any such provision. However, no appeal was preferred against the order declaring that he was entitled to interest; but that order was sought to be challenged in the appeal preferred against the final order. The learned Judges of the Travancore-Cochin High Court took the view that the appellant was entitled to do so However, the learned Judges were of opinion that if the appellant had not raised the question in the memorandum of appeal, he would not be entitled to do so The learned Judges observed.

"The circumstance that the appellant had not in his memorandum of appeal made the correctness of the execution Court's order as to interest on mesne profit a ground of objection disentitled him to raise the question before the lower appellate Court."

I would like to make one comment with regard to this observation If this observation of the learned Judges merely referred to the general principle that it is in the discretion of the Court whether it will allow an appellant to urge a point at the time of the hearing, which was not raised in the ground of appeal, or not, there can be no dispute with regard to the statement of the learned Judges But if they are of the view that the right of an appellant to canvass the correctness of an earlier order in the subsequent appeal is available to him at all only if he had raised the question in the grounds of appeal, I find it difficult to subscribe to such a proposition.

There is an unreported decision of this Court in *Santhia Servai v Solayappa Chettiar*[2], to which I am referred to by the learned Counsel for the appellant In that case the appellant applied for setting aside the sale under Order 21, rule 90, Civil Procedure Code and the execution Court passed an order under the proviso to Order 21 rule 90, Civil Procedure Code directing the appellant to furnish security for the amount obtained at the sale. But as he did not take steps for testing the security offered, the application was ultimately dismissed Against the order dismissing the application for non-prosecution, C M A No 92 of 1959 was filed in this Court After dismissal of the application, the appellant filed an application for setting aside the order of dismissal for default That application was also dismissed by the lower Court and against that order C M A No 86 of 1959 was preferred in this Court It must be remembered that no independent appeal was preferred by the appellant in that case against the order of the execution Court directing him to furnish security for the amount obtained at the sale Notwithstanding that, in the appeals against the final order, a Division Bench of this Court went into the correctness of the execution Court's order passed on the earlier occasion directing the appellant to furnish security allowed the appeals In view of these decisions, I hold that the appellant in the present case is entitled to challenge in the present appeal the correctness of the order, dated 14th November, 1963 made in E A. No 525 of 1963

With regard to the first contention, I am of the view that there is no substance in that part of the contention of the learned Counsel where he argues that the proviso to Order 21, rule 90, has no application to a mortgage decree The rule with the proviso is in the following terms

1. A I R 1952 T C 316 at 317.
2. C M A Nos 86 and 92 of 1959.

"Where any immovable property has been sold in execution of a decree, the decree-holder or any person entitled to share in a rateable distribution of assets or whose interests are affected by the sale, may apply to the Court to set the sale aside on the ground of a material irregularity or fraud in publishing or conducting it.

Provided that the Court may, before admitting the application, call upon the applicant either to furnish security to the satisfaction of the Court for an amount equal to that mentioned in the sale warrant or that realised by the sale, whichever is less, or to deposit such amount in Court"

Thus it will be seen that the rule applies to every case where an immovable property has been sold—whether it is in execution of a mortgage decree or any other decree and the language of the rule does not warrant any distinction being made between the sale of an immovable property made in execution of a mortgage decree and that in execution of any other decree. Mr. Ramanathan, in support of his contention, relied upon the unreported decision of this Court referred to by me above. The relevant observations in that decision on which the learned Counsel relied are as follows:

"We are satisfied that on the merits of the case the lower Court should not have demanded security from the appellant. The decree was on the basis of the mortgage There was therefore ample security for the amount due thereunder. To require the judgment-debtor or his representative to give security once over for amount covered by the decree In our opinion, the terms of the proviso to Order 21, rule 90, Civil Procedure Code, which requires security to be furnished either in respect of the amount mentioned in the sale proclamation, or in respect of the sale amount would be inappropriate in the case of a mortgage decree, as there is already a subsisting security for the decree amount It may be that in certain cases on account of the delaying tactics adopted by the judgment-debtor, the existing security might depreciate and in such event it might be considered equitable that there should be a power in Court to demand security for the deficiency *viz*, between the amount realised at the sale and the present value of the property But there is no provision in Order 21, rule 90, Civil Procedure Code, to cover a case of such deficiency in security In the case of a mortgage decree it will be apparent from the above discussion that a Court can be said to be exercising its jurisdiction wisely if it does not demand security under the proviso to Order 21 rule 90, Civil Procedure Code"

The above observations make it abundantly clear that the learned Judges in deciding that case were merely concerned with the exercise of discretion on the part of the Court under the proviso to Order 21 rule 90, Civil Procedure Code and were of the view that the discretion must be exercised in a particular manner in relation to a mortgage decree The said observations do not establish that the proviso to Order 21, rule 90, Civil Procedure Code is not attracted to a case of mortgage decree However the second part of the contention of Mr Ramanathan is well founded I have already extracted the order of the learned Subordinate Judge dated 14th November, 1963 in which he has concluded that it was a fit case to call upon the appellant to furnish security to the extent of Rs 2,000 The learned Subordinate Judge referred to Exhibit A-1 which mentioned the rent fetched by the property as Rs 500 per month and also Exhibit A-2 which mentioned the value of the property as Rs 60,000. At the same time the learned Subordinate Judge pointed out that all the four mortgages which included the mortgage on the basis of which the present decree was obtained, amounted to Rs 35,000. The learned Subordinate Judge thereafter referred to the contention put forward on behalf of the respondent herein and without taking into asccount the value of the property with reference to the total liability that was existing on the property, he considered it a fit case for directing the appellant to furnish security Mr Rajagopala Iyer contended that admittedly there were four mortgages over the property,

that for a number of years no amount was paid either towards the principal or interest, that consequently the liability on the property was swelling day after day, that in the sale in question the property was sold only for Rs 2,005 and that therefore there was a risk of the property fetching less in any further subsequent sale I am however unable to accept this contention In the case of a mortgage decree a proper exercise of discretion on the part of the execution Court will be to direct furnishing of security only if it comes to the definite conclusion that the value of the property will not be sufficient to cover the liability on the property, including the amount for which the property was sold So long as the learned Subordinate Judge has not come to a positive conclusion on this aspect, he will not be exercising his discretion properly or legally, if he directs the applicant to furnish security. Therefore, I am of the view that on the facts of this case the learned Subordinate Judge was not justified in dismissing the application of the appellant to dispense with security and directing him to furnish security.

Then remains the third contention of Mr Ramanathan. According to him on 16th January, 1964 the execution Court passed the following order·

"Test warrant not returned. Title deeds Await 27th January, 1964 and notice "

The argument is that this was an order made by the Court on the present E A directing notice to the other side, that would amount to admitting the petition, that in terms of proviso to Order 21, rule 90, Civil Procedure Code, the jurisdiction of the Court to demand security is available only before admitting the petition and that once the Court has admitted the petition no such jurisdiction is available to it. The learned Counsel in support of this proposition, relied on the decision of this Court in *Vaidyanatha* v *Indian Bank Ltd.*[1]. In my view that decision does not help the appellant's contention In the present case, as I have already stated on 14th November, 1963, the learned Subordinate Judge has directed the appellant to furnish security within a period of one month. Thereafter the appellant furnished security. It is only at that stage on 16th January, 1964 the notice referred to above was directed by the Court Consequently even if the order directing notice is to be taken as constituting the admission of the petition, which was done after demanding security, once security had been demanded earlier to the admission of the petition, the subsequent admission does not take away the jurisdiction of the Court to test the security permitted to be furnished already. It is relevant to refer to the observations of this Court in *Venkata Lingamma* v *Rajagopala Venkata Narasimha*[2], to the following effect:

"It is clear therefore to us that in issuing notice the Court did not intend to deprive itself of the power of deciding whether the security to be eventually furnished by the petitioner was adequate or not, and when it was found that the security was not adequate, the Court was entitled under rule 90 as now amended to dismiss the application without any further consideration on its merits "

Therefore I am of the view that on the facts of this case the contention of Mr. Ramanathan that by virtue of the order, dated 16th January, 1964 the learned Subordinate Judge had denied to himself the right to insist on the compliance with his order, dated 14th November, 1963 is not tenable. However, in view of my conclusion that the order dated 14th November, 1963 dismissing the application of the appellant to dispense with security is erroneous, this appeal succeeds and has to be allowed, with the result that the learned Subordinate Judge will have to dispose of the application of the appellant for setting aside the sale on merits. There will be no order as to costs.

S.V J. *Appeal allowed, case remanded.*

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1. A I.R. 1955 Mad. 486 2 (1942) 1 M L J 403 : A I R 1942 Mad 509.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE T. VENKATADRI

Godrej & Boyce Mfg Co. Private Ltd , and others .. *Petitioners**

v

The Special Tahsildar, Land Acquisition, Industrial Estate, near Avadi, and others . *Respondents.*

Land Acquisition Act (I of 1894), section 6—Petitioner-company—Leading manufacturers of steel furniture—Purchase by them of land near Ambattur Industrial Estate—Acquisition of such lands by the State for allotment to other industries—If a public purpose—Articles 14 and 19 of Constitution—If infringed

The Government, under its policy to develop the industries and industrialise the State, started the Ambattur Estate, by acquiring large tracts of land, developed them, constructed factory sheds and allotted such factory sheds and developed sites to various applicants who intended starting industries, small, medium or large This is no doubt acquisition for a public purpose. But the acquisition of the petitioner's lands for the purpose of allotting them to various applicants to start industries, when the petitioner-company itself has purchased the lands for developing or expanding their business activities in the South, cannot be called acquisition for a public purpose

The petitioner has purchased about 22 acres for the purpose of expanding its industry While the State Government, after acquisition of other lands, for the industrial estate, were allotting lands ranging from 20 acres to one acre, to say that the 22 acres in the possession of the petitioner-company was far in excess of its requirements is not understandable

While the policy of the State would appear to encourage industrialists to start industries in this part of the country there is no reason why the very same Government should thwart the ambitious plans of reputed manufacturer to start and expand its business activities in South India This is a clear case of discrimination violative of Articles 14 and 19 of the Constitution.

The purpose of the present acquisition is to wrench the lands belonging to the petitioner and allot them as factory space or developed sites to applicants of their choice This appears to be not only whimsical but also arbitrary In the absence of any priority or principle in the matter of allotment of factory space or developed sites, it appears to be a case of discrimination, if the peritioner's lands are taken away for the purpose of allotting them to other applicants similarly placed as the petitioner. The petitions will have to be allowed

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to consider all the contentions raised in W P No 1032 of 1964 and review its judgment dated 9th January, 1967 in W P. No 1032 of 1964 presented to the High Court under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records and quash the proceedings of the 2nd respondent contained in No 4064 of 1962 on page 1634 of the *Fort St. George Gazette,* dated 29th August, 1962, Memo No 103838/LA 11/64 dated 20th August, 1962 and marked as Exhibit " A " in respect of Survey Nos 167, 170, 171, 173, 174/1-A, 174/1-B and the declarations under section 6 (1) of the Land Acquisition Act contained in the *Fort St Gazette Gazette* dated 18th September, 1963 (1) On page 2197, No 4844 of 1963 G O R No 1578, Industries, Labour and Co-operation dated 3rd September, 1963 in respect of Survey No 170, 171 and 173 and (2) on page 2198, L I, No 4845, 1963—G O R. No 1580, Industries, Labour and Co-operation dated 3rd September, 1963, in respect of Survey Nos 174/1-A and 174/1-B marked as Exhibit ' B ' and all further proceedings initiated in pursuance thereof.

* C M P No 8419 of 1967 in W P No 1032 of 1964 24th January, 1968.

G Vasantha Pai, for Petitioners

The Government Pleader, for Respondents

The Court made the following

ORDER —This is an application to consider all the contentions raised in W P. No 1032 of 1964 and review my judgment dated 9th January, 1967 That writ petition was filed for the issue of a writ of *certiorari* to quash the proceedings of the second respondent (State of Madras represented by the Secretary to the Government, Industries, Labour and Co-operation Department) and the declaration under section 6 (1)of the Land Acquisition Act on various grounds, *viz*, that the purpose for which the lands were acquired was not a public purpose, that the declaration was invalid and illegal inasmuch as the lands were already purchased by the petitioner for an industry, that the compulsory requisition of the lands belonging to the petitioner for the purpose of converting the same into an industrial estate was not a public purpose within Article 31 (2) of the Constitution of India and section 6 (1) of the Land Acquisition Act, that the reasons given by the second respondent that the extent of lands owned by the petitioner was far in excess of the requirements of the petitioner-company constituted an arbitrary deprivation of the petitioner's property and violative of Article 31 (1) and that there was violation of Article 14 and Article 19 of the Constitution

When that writ petition came for final hearing, judgment had been rendered by their Lordships of the Supreme Court in *State of M P* v *Vishnu Prasad*[1], that there was nothing in sections 4, 5-A and 6 to suggest that section 4 (1) was a kind of reservoir from which the Government might from time to time draw out land and make declaration with respect to it successively. In the instant case section 4 (1) notification was on 29th August, 1962, and declaration under section 6 was made from time to time from 16th February 1963 to 24th July, 1963 The petitioner also contended that piecemeal declarations under section 6 of the Act from time to time were invalid. In view of the decision of the Supreme Court there was no necessity then to consider the other contentions raised in the writ petition and the writ petition was allowed. While allowing the writ petition I had observed that in case Government started fresh proceedings for the acquisition of these properties the petitioner would be entitled to urge all the other contentions which had not been considered in the writ petition As I said the judgment in the writ petition was delivered on 9th January, 1967 On 20th January, 1967, the Land Acquisition (Amendment and Validation) Ordinance, 1967, was promulgated by the President of India. Under section 5 (1) (*a*) (iii) of the Ordinance, notwithstanding any judgment, decree or order of any Court to the contrary, no acquisition of land made or purporting to have been made under the principal Act before the commencement of the Ordinance and no action taken or thing done (including any order made, agreement entered into or notification published) in connection with such acquisition shall be deemed to be invalid or ever to have become invalid merely on the ground that one or more declarations have been made under section 6 of the principal Act in respect of different parcels of the land covered by the same notification under sub-section (1) of section 4 of the principal Act in pursuance of one or more reports under section 5-A thereof The effect of the Ordinance was to nullify the judgment rendered in the writ petition It is under these circumstances, the petitioner-company has filed the present application praying that the Court may be pleased to consider the other contentions raised in the writ petition. I have, therefore, to consider the other legal ocontentions raised by the petitioner in the above writ petition.

It is necessary for me to reiterate the main facts leading to the filing of the writ petition, in order to have a cogent reading of the present order. The petitioner-company has been carrying on a manufacturing occupation, trade or business under the name and style of Messrs. Godrej and Boyce Manufacturing Company Private Limited They are the largest manufacturers of steel furniture and fittings in

1 (1966) 2 S C J 231 A I R 1966 S C 1593.

the East The company is manufacturing several kinds of steel products like office equipment, hospital equipment, security articles, refrigerators, typewriters and several other products The company had its factory and housing colony at Vikroli on nearly 3,600 acres of land. The company has its works at Lalbaugh, Parel, Bombay, on eight acres of land Due to expanding business and increasing demand from the South, the company was on the look out for some land in Madras and after nearly two years of effort was able to secure about 22 acres of land from various sellers in Ambattur near the Railway line to equip itself with a siding as and when the warehouses, commercial offices and assembly shop and factory are built Learned Counsel for the petitioner represented to me that even before purchasing the lands, the petitioner-company made not only local enquiries but also enquiries at the Governmental level, whether these lands were likely to be acquired by the State

During this period, the Madras State Government, in respect of their industrial policy, made a landmark by developing an Industrial Estate at Ambattur This estate is located in one of the most important industrial belts in the City, a fast growing complex of small, medium and large industries It is also very near to the City of Madras Under the scheme conceived in 1961, the Madras State acquired large tracts of land, developed them and plotted them into developed sites and also constructed factory-sheds and allotted them to various applicants who wanted to start industries. The fully developed sites are provided with all the facilities required for starting an industry, *viz* , water supply, power supply, drainage, sewage, roads etc. Credit must be given to the State of Madras for developing this industrial estate in Ambattur for the manufacture of ancillary parts for major industries and the manufacture of consumer goods The policy of the Government was to industrialise the whole State and the wisdom of the Government is to invite, encourage and stimulate the industrialists to venture starting of manufacture of ancillary parts to major industries and also manufacture of consumer goods. The whole atmosphere was thus surcharged with the emotion to industrialise the State and thus change the face of industrial economy in the State It was at that stage, the petitioner-company, which is a reputed firm in the manufacture of steel parts and articles and which has a factory in Bombay on about 3,600 acres of land, wanted to expand their business activities in the South and therefore obtained 22 acres of land for that purpose The lands purchased by petitioner-company are situate in the northern corner of the industrial estate, which is yet to be developed in the second phase of the Government's plans. In the first phase of the plan, lands in the southern part of the Estate have been developed, plotted and allotted to various businessmen to start their industries Facotry-space has been allotted to various industrialists This ranges from 20 acres to one acre Government have acquired about 300 acres of land on the northern side, and the petitioner's land is in the extreme corner. It was only after collecting information locally and after making discreet enquiries at the governmental level, the petitionr-company purchased the lands, on the assumption that the Government would not acquire those lands. But unfortunately after the lands were purchased by the petitioner, Government seem to have changed their mind and wanted to develop the industrial estate on the northern side also It was how they came upon the petitioner's lands also so as to have territorial contiguity for their estate When the petitioner came to know that the State Government were taking steps to acquire the lands it has purchased, the petitioner approached the Government to exempt the lands which it has purchased from being acquired. In fact, in one of their letters which is dated 18th June, 1962, the company was even prepared to give the Government reasonable amount of land that it had purchased so as to make a straight line boundary between the company's lands and the land proposed to be acquired by the Government for the industrial estate, on condition that an equivalent amount of land would be given to the petitioner from other place adjoining the lands it has purchased The Secretary to the Government by his letter dated 7th July, 1962, stated that it was proposed to exclude about 7 acres of petitioner's lands from the proposed acquisition of lands for the expansion of the industrial estate When the petitioner wanted to know where exactly the 14 acres

of lands would be given by Government in lieu of their taking away of the petitioner's 14 acres of lands, the Government finally stated that the extent of lands owned by the petitioner and exempted from the proposed acquisition for the industrial estate was itself far in excess of the requirements of the comapany, and that therefore the request for allotment of an alternative site in lieu of the extent proposed to be acquired for the industrial estate could not be complied with. In spite of the fact that the petitioner represented to the Government that they are the largest manufacturers of steel furniture and that they wanted to expand their business activities in the South the Government proceeded with the land acquisition proceedings and issued the notification under section 4 (1) which was subsequently followed by section 6 declaration It was at that stage the petitioner-company rushed to this Court and filed the writ petition on the grounds already mentioned by me in the earlier part of this judgment.

I consider that the most important point for consideration is whether there has been discrimination or violation of Article 14 and Article 19 of the Constitution in this case.

The policy of the Government is to develop the industries and thus industrialise the State For this purpose, Government started the Ambattur industrial estate. Government acquired large tracts of land, developed them, constructed factory sheds and allotted such factory-sheds and developed sites to various applicants who intended starting industries, small, medium or large This is no doubt acquisition for a public purpose. But the acquisition of the petitioner's lands for the purpose of allotting them to various applicants to start industries, when the petitioner company itself has purchased the lands for developing or expanding their business activities in the South, cannot be called acquisition of lands for a public purpose Further, the State Government have allotted plots to various industrialists, after acquisition, as developed sites ranging from 20 acres to one acre. The petitioner-company has purchased about 22 acres for its own use for its proposed project to be carried out in stages, like building warehouses, assembly shop, commercial house etc This was in pursuance of the plan of the company to expand its business activities in the South In doing so, the company has come forward to supplement the policy of industrial expansion by the State in the State. Under such circumstances, the reasoning given by the Secretary to the Government of Madras that the lands owned by the petitioner is far in excess of its requirements is beyond one's comprehension. Government can no doubt use its discretion But discretion means sound discretion guided by law It must be governed by rule and not by humour It should not be arbitrary, vague or fanciful. In the reasoning of the Government, I see no rhyme or reason or logic There is absolutely no material on the record, for the Government to come to the conclusion that out of the 22 acres of land purchased by the petitioner, 7 acres would be sufficient for the petitioner's use and business activities and that the other remaining 14 acres is far in excess of the requirements of the company. As I already said, the Government themselves have allotted developed sites of more than 20 acres to some of the applicants to start their industries. Curiously enough, when the petitioner-company requested the Government for exemption of all the lands owned by the company from the proposed acquisition, the Government, while expressing their inability to do so have added that in case the petitioner submitted an application for a developed plot in the area, it would be considered by the Government on merits The petitioner-company has purchased plots at Rs. 11,000 per acre According to the offer of the Government, they would sell the same plot as developed site at Rs 16,000 per acre This appears rather unreasonable. The statement by the Government that the lands in the possession of the petitioner is far in excess of its requirements and the further or subsequent statement that the Government would consider any application of the petitioner for a developed site on merits would appear to be self-contradictory While the policy of the Government would appear to encourage industrialists to start industries in this part of the country, there is no reason why the very same Government should

thwart the ambitious plans of a reputed manufacturer to start and thus expand its business activities in South India. This to my mind is clear case of discrimination violative of Articles 14 and 19 of the Constitution The purpose of the present acquisition is to wrench the lands belonging to the petitioner and allot them as factory space or developed sites to applicants of their choice. The policy of the Government in securing the petitioner's lands appears to be not only whimsical but also arbitrary.

Learned Counsel for the State cited the decision of the Surpreme Court in *Somawanti* v *State of Punjab*[1] In that case, the petitioners purchased six acres of land for Rs. 4,50,000 for the purpose of establishing a paper-mill Air Conditioning Corporation, respondent 6 in the petition, held a licence from the Government of India for starting a factory for the manufacture of various ranges of refrigeration compressors and ancillary equipment This respondent requested the State of Punjab for the allotment of an appropriate site for the location of the factory The petitioners requested the Government not to acquire their lands Though assurances were given by the Deputy Commissioner of the District, the Governor of Punjab issued a notification under section 4 (1) of the Land Acquisition Act declaring that the lands of the petitioners were likely to be needed by Government at public expense for a public purpose, namely, for setting up a factory for manufacturing various ranges of refrigeration, compressors and ancillory equipment The petitioners contended that they had purchased the land *bona fide* for industrial purposes Their Lordships of the Supreme Court observed as follows at page 170 :

> " Apart from that it is always open to the State to fix priorities amongst public utilities of different kinds, bearing in mind the needs of the State, the existing facilities and other relevant factors In the State like the Punjab where there is a large surplus of fruits and diary products there is need for preserving it There are already in existence a number of cold storages in the State. The Government, would, therefore, be acting reasonably in giving priority to a factory for manufacturing refrigeration equipment which would be available for replacement in these storages and which would also be available for equipping new cold storages."

Accordingly, the Supreme Court upheld the acquisition proceedings in that case. But in the instant case, there is no such priority and the policy of the Government is only to acquire lands, develop them and allot them to various applicants in the Industrial Estate In the absence of any priority or principle in the matter of allotment of factory space or developed sites, it appears to be a case of discrimination, if the petitioner's lands are taken away for the purpose of devloping them and alloting them to other applicants similarly placed as the petitioner There is also no differentiation between the petitioner's industry and other industries which are sought to be preferred The Government cannot treat such applicants as a class and discriminate the petitioner who is also an individual industrialist who has already purchased lands with a view to expand his industry in the South There is nothing in the record nor is there any surrounding circumstances to note that there is any reasonable classification in the matter of such allotment by the Government of factory space or developed sites It is worthwhile to remember the words of the Supreme Court in *Rama Krishna Dalmia* v. *Justice Tendolkar*[2],

> " . . .. the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undicslosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation "

Learned Counsel for the State next contended that it is within the power of the State to acquire property from *A* and give it to *B* on the ground of public purpose and that the public purpose varies with the times and prevailing conditions in locali-

1 (1963) 2 S C J 35 · (1963) 2 M L J (S C) 18 (1963) 2 An W R (S C) 18 (1963) 2 S C R. 774 · A.I R 1963 S C 151

2 (1959) S C J 147 . (1959) S C.R 279 : (1959) 1 An W R (S C) 67 (1959) 1 M L J. (S C) 67 A I.R. 1958 S C 538 at 548

ties especially when it involves the welfare of the public in general, as opposed to particular interest of individuals, and he cited the decision of the Supreme Court in *Arnold Rodricks* v *State of Maharashtra*[1] But in that case, their Lordships of the Supreme Court had no occasion to discuss Article 14 of the Constitution. Learned Counsel for the State further contended that once there is the Government declaration under section 6 that a particular land is needed for a public purpose, the conclusiveness of it is necessarily attached not merely to the land but also to the question whether the purpose is a public purpose It is very much in doubt to say that the petitioner's lands are acquired for a public purpose. The land acquisition proceedings are sought to be quashed by the petitioner on constitutional grounds such as violation of Article 14 and Article 19 Of course, learned Counsel for the petitioner has also attributed *mala fides* to governmental authorities In this connection, it is useful to refer to the following message from Maxwell on Interpretation of Statutes (10th Edn) Page 122

> " Enactments which confer powers are so construed as to meet all attempts to abuse them, either by exercising them in cases not intended by the statute, or by refusing to exercise them when the occasion for their exercise has arisen. Though the act done was ostensibly in execution of the statutory power and within its letter, it would nevertheless be held not to come within the power if done otherwise than honestly and in the spirit of the enactment."

In *Smith* v *East Ellore R. D C*[2], the owner of a land and dwelling-house filed an action for declaration that the complusory purchase order was made in bad faith. Lord Reid, though dissented from the majority judgment, has made some observations which are relevant for our purpose

> " It seems to me that there were four grounds on which the Courts could give relief First informality, of procedure, where, for example, some essential step in procedure had been omitted Secondly, *ultra vires* in the sense that what was authorised by the order went beyond what was authorised by the Act under which it was made Thirdly, misuse of power in *bona fide* And, fourthly, misuse of power in *mala fide*."

While dealing with misuse of power, Lord Reid quoted the following passage of Lord Greene in *Associated Provincial Picture Houses Lrd.* v *Wednesbury Corporation*[3]

> " The exercise of such a discretion must be a real exercise of the discretion. .. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider If he does not obey those rules, he may truly be said, and often is said, to be acting ' unreasonably '. . . . . . Theoretically it is true to say . . that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere . . the Court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account, or conversely, has refused to take into account or neglected to take into account matters which it ought to take into account Once that question is answered in favour of the local authority, it may still be possible to say that the local authority, nevertheless, have come to a conclusion as unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the Court can interfere The power of the Court to interfere in each case is not that of an appellate authority to override a decision 'of the local authority, but is that of a judicial authority which is concerned and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in it '."

Bearing the above principles in mind, if I examine the impugned orders in this case, I find that though what has been done by the Government is in good faith,

1. A I R. 1966 S C 1788
2 (1956) 1 A E R 855
3 (1947) 2 All E R 680

still it is *bona fide* misuse of power, and the decision of the authorities, that the lands now in the possession of the petitioner, which are sought to be acquired by Government, are far in excess of the petitioner's requirements, appears to be so unreasonable in the context of the petitioner's proposed magnitude of business activities in the South that no reasonable authority could have ever come to it.

For the foregoing reasons, the Civil Miscellaneous Petition is allowed Consequently, the Writ Petition also will stand allowed. There will be no order as to costs.

V S. — *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE N. KRISHNASWAMY REDDY

Ramanuja Naidu and others . *Petitioners* *

Penal Code (XLV of 1860), section 378—Theft—Defence of taking under a bona fide *claim—Rival purchasers of same property—Lessee in possession—Crops raised by lessee—Removal of crops by one purchaser—*Bona fide *claim to property—Sustainability.*

The lands in the possession of the lessee was first sold to the petitioners but the sale deed was not registered The same land was sold to another by a subsequent sale deed which was registered The first sale deed was then registered on the application of the petitioners The lessee who was continuing in possession had raised crops The petitioners trespassed into the land, cut and carried away the crops The question is whether the petitioners would be entitled to a *bona fide* claim of right to the properties

Held, on the facts that the lessee had raised the crops, that the petitioners were fully aware of it and that they had not made out a case as to how they were entitled to the crops raised by the lessee of the original owner, the *bona fide* claim of right cannot be sustained

The *bona fide* claim of right can be asserted between two rival claimants. It is probable that such a claim can be made by two rival purchasers of property. Where there is no such claim put forward but a trespass alleged against the lessee who is lawfully in possession and the lessee had raised crops thereon, the removal of the crops by the petitioner's purchaser cannot be sustained on the basis of the *bona fide* claim to property

Petition under sections 435 and 439 of the Code of Criminal Procedure ,1898, praying the High Court to revise the order of the Court of the District Magistrate (J) South Arcot at Cuddalore, dated 29th November, 1965 and made in C A No. 190 of 1965 (C C No 1303 of 1965 on the file of the Court of the Sub-Magistrate, Cuddalore).

K Ramaswami, for Petitioners.

The Assistant Public Prosecutor, for State

The Court made the following

ORDER —The revision petitioners were accused 1 to 3 and 4 and 8 in C C. No. 1303 of 1965, on the file of the Sub-Magistrate, Cuddalore Accused 1 to 3 were convicted under sections 143, 447 read with 114 and 379 read with 114, Indian Penal Code, and they were sentenced each to pay a fine of Rs 40, on each count, in default to undergo rigorous imprisonment for two weeks on each count. Accused 4 and 8 were convicted under sections 143, 447 and 379, Indian Penal Code, and each was sentenced to pay a fine of Rs 25 under each count, in default to undergo rigorous imprisonment for two weeks on each count, by the Sub-Magistrate, Cuddalore. On appeal, the convictions and sentences were confirmed by the District Magistrate, South Arcot

* Cr R C No 488 of 1966 ,
Cr R P No 481 of 1966 — 1st March, 1968.

The short point that arises for consideration in this revision petition is whether the petitioners, in the circumstances of this case, would be entitled to a *bona fide* claim of right to the properties in question To appreciate this point, it is necessary to note briefly the facts of the case

One Lakshmi Ammal and her daughter-in-law one Jayalakshshmi, native of Tanjore district but residing in Cuddalore, owned about 13 acres of lands in Eachankattukuppam Village, which were leased out to P W 1 Ramanuja Naidu in 1962 under Exhibit P-1 the lease deed By virtue of Exhibit P-1, P W 1 was in possession of the properties as lessee. The owners of the properties executed sale deeds in favour of accused-4 and his wife under Exhibits, D-1 and D-2 on 30th August, 1964, for a sum of Rs. 19,800; but they were not registered On 1st September, 1964, they executed another sale deed in favour of one Kannappan in respect of the same properties covered under Exhibits D-1 and D-2 for a sum of Rs 28,000. This sale deed was of course registered Having come to know that the properties were sold to Kannappan, accused-4 filed an application to the District Registrar for compulsory registration of Exhibits D-1 and D-2 and subsequent to the registration of the sale deed in favour of Kannappan, Exhibits D-1 and D-2 were compulsorily registered In the meanwhile, Kannappan obtained a lease deed under Exhibit P-2 dated 19th September, 1964 from P W. 1, the lessee under the original owners P W. 1, even after the sale deed by the owners in favour of Kannappan and accused-4 and his wife, continued to be in possession of the properties not only as a lessee under Kannappa but also a tenant holding over under the original owners At the time of sale in favour of Kannappa, there were Ragi crops raised by P W 1 in some of the lands and P W 1 harvested the same and after harvest, he raised paddy in a portion of the lands and when paddy crops in the lands were ready to be harvested, the revision petitioners unlawfully trespassed into the lands on 30th December, 1964, threatened P Ws 2 to 4 who were in the lands and with help of about 300 men they had brought with them, cut and carried away the paddy crops from the lands.

The prosecution examined serveral witnesses to prove that the accused cut and removed the paddy crops raised by P W 1. The finding of the lower Courts is that even after the rival sale deeds came into existence, P W 1 continued to be in possession of the properties and he raised the crops The learned Counsel for the petitioners was unable to challenge the finding of the Courts below that it was P.W. 1 who was in possession of the properties and raised the crops in question. The Courts below further found that the accused cut and removed the crops raised by P.W. 1. It was contended on behalf of the revision petitioners in the lower Court that even assuming P W. 1 was in possession of the properties and raised crops, the removal of the crops from the properties by the revision petitioners could not be said to be a dishonest removal bringing within the mischief of section 379, Indian Penal Code, and that they are entitled to claim their right to enter upon the land as they had purchased it by sale deeds Exhibits D-1 and D-2 and thus, it is said, that their claim is *bona fide*. The same contention is reitereated before me by the learned Counsel for the revision petitioners. I am unable to agree with this contention. It has been found by the lower Courts as already pointed out, that P W. 1 as a lessee continued to be in possession of the properties and he raised the crops which was subsequently harvested and removed by the revision petitioners. The *bona fide* claim of right can be asserted between two rival claimants It is probable that such a claim by the revision petitioners might be justified as against Kannappan who also claimed the property by virtue of a sale deed But it is not the case that there was dispute between these two rival claimants. The trespass alleged was against the possession of P W 1 If there were no crops on the land and the crops were not raised by P W. 1 and if the land was lying vacant and in those circumstances, one of the rival parties had entered on the property to take possession by virtue of the sale deeds in their favour, there will be a justification for the party who enters upon the land to assert a *bona fide* claim The learned Counsel for the petitioners relied upon the following decisions:

In *Chandi Kumar Das Karmaikar* v. *Abanidhar Roy*[1], the Supreme Court has observed thus :

" A claim of right in good faith, if reasonable, saves the act of taking from being theft and where such a plea is raised by the accused, it is mainly a question of fact whether such belief exists or not."

In that case, two rival claimants were in the picture whereas, it is not so in this case, as already pointed out by me

In *S S Apparao* v *B Lakshminarayana*[2], the Supreme Court held as follows in relation to the facts of that case:

" Where a *bona fide* claim of right exists, it can be a good defence to a prosecution for theft The act does not amount to theft, unless there be not only no legal right but no appearance or colour of a legal right "

In that case also, the assertion of *bona fide* claim was against the rival claimant The same principle was reiterated by the Supreme Court in *Chandi Kumar* v *Abanidhar Roy*[1].

In *Narasayya* v *State*[3], Ramaswami, J , held in the circumstances of that case that there must be something more than a mere assertion or an untested and uncorroborated statement from the dock in order to make out the claim of a *bona fide* right, and that the Court must find that the plea is not a mere pretence to cover an otherwise unjustifiable act.

In that case also, the dispute was between two rival claimants I am of the view that the decisions relied upon by the learned Counsel would not help him in relation to the facts of this case. The observations made in *Abdul* v *Emperor*[4], by Fazli Ali, J , as he then was, are worthwhile to note to appreciate the position in respect of the facts of this case. It is observed as follows —

" It must, however, be remembered that the claim put forward by the accused must be an honest one and it will be of no avail to him as a defence if it is found to be a mere colourable pretence to obtain and keep possession of the property. The decision on this point will depend in each case on the circumstances of that particular case, but it may be safely laid down as a general proposition that in cases where the alleged theft consists in the removal of crops grown on land, the most vital question to be investigated is as to which of the parties had grown the crops and a decision on this point, will in the majority of cases enable the Court to come to a definite conclusion as to whether the claim of the accused is made in good faith or is mere pretence, but it cannot be laid down as a universal rule that in every case where *A* removes crops grown by *B*, *A* necessarily commits an offence under section 379, Penal Code "

I respectfully agree with the above observations As already pointed out by me, in this case it was P.W. 1 who raised the crops and the revision petitioners were fully aware of it The revision petitioners had not made out a case as to how they were entitled to the crops raised by P.W. 1. On the other hand, their plea was that they raised the crops, which was negatived by the Courts below

In the result, the revision petition is dismissed.

V S. *Revision Petition dismissed.*

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1 (1964) M L J (Crl) 238 (1964) 1 S C J 419 (1964) M.W N (Crl) 74 at 75 : A I R 1965 S C 585

2. (1962) M L J (Crl) 629 (1962) 1 S C R (Supp.) 8 : (1962) 2 An.W.R. (S.C.) 109. (1962) 2 M L J (S C) 109. (1962) 2 S C J 469.

3 (1953) 1 M L J 290. (1953) M W N (Crl) 89

4. A I.R 1929 Pat 86.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE A ALAGIRISWAMI.

M. Rajangam Ayyar .. *Appellant**

v.

Natesa Chettiar .. *Respondent.*

Civil Procedure Code (V of 1908), Order 20, rule 12—Suit for partition, separate possession and mesne profits—Preliminary decree providing for ascertainment of mesne profits—Final decree not providing for mesne profits—Whether it is open to Court to ascertain mesne profits and pass another final decree.

It is well settled that there can be more than one preliminary decree and more than one final decree Unless the plaintiffs' prayer for mesne profits had been specifically considered and refused, it was open to the Court to entertain a subsequent application for mesne profits, after the passing of the preliminary decree and before the passing of the final decree Where the preliminary decree provides for mesne profits and the final decree does not provide for mesne profits, it would be open to the Court to pass another final decree after ascertainment of mesne profits. A suit cannot be said to have been finally disposed of until all the prayers in the plaint have either been granted or specifically refused. The preliminary decree having provided for ascertainment of mense profits and the final decree not having provided for mesne profits, it is open to the Court to ascertain it and pass another final decree.

It cannot be said that because the final decree already passed does not provide for mesne profits, it should be deemed to have been refused

Appeal against the Decree of the Court of the Subordinate Judge, Kumbakonam, preferred against the Decree of the District Munsif Court, Valangiman, in I.A. No. 1171 of 1961 in O.S No. 35 of 1953.

V. Krishnan and *P. Veeraraghavan,* for Appellant.

N. R. Govindachari, for Respondent.

The Court delivered the following

JUDGMENT —This Second Appeal is against the judgment on appeal of the learned Sub-Judge of Kumbakonam in A.S. No. 69 of 1962 against the order of the District Munsif, Valangiman at Kumbakonam in I A. No 1171 of 1961 in O.S. No 35 of 1953. The plaintiff in O S. No 35 of 1953 is the appellant O S No 35 of 1953 was a suit for partition and possession of the plaintiff's share of the suit properties Along with the prayer for partition and possession of his share, the plaintiff also prayed for mesne profits. The preliminary decree provided not merely for partition and possession of the plaintiff's share but also for the ascertainment of mesne profits and it being provided for in the final decree. It appears that while the petition for passing the final decree was pending, the appellant filed an application for ascertainment of mesne profits. The application was returned a number of times by the Court raising the question as to how a petition for ascertainment of mesne profits could be filed before the final decree for alloting the plaintiff's share had been passed. Though this does not appear either in the judgment of the trial Court or in the judgment of the appellate Court, I have been shown a certified copy of the order in the earlier application filed by the appellant But unfortunately, the appellant did not represent the earlier petition but filed a petition out of which the present appeal arises for ascertainment of mesne profits. The trial Court held that the mesne profits could be ascertained The appellate Court took the view that the mesne profits not having been ascertained and provided for in the final decree it is not possible to do so in this application The lower appellate Court relied upon two

* S.A. No. 533 of 1963. 26th July, 1967.

decisions, one reported in *Basavayya* v *Guruvayya*[1], and another in *Arunachala Mudali* v. *Maragathammal*[2] It appears to me that neither of these decisions are in point In the first decision what the Full Bench decided was that in a suit for partition even though there is no prayer in the plaint as regards the claim for mesne profits, it is still open to the Court to hold an enquiry regarding mense profits during the pendency of the suit, that is, before a final decree is passed That was a case like the present one which falls under Order 20, rule 18 We are not concerned, however, in the present case with the question of the plaintiff not having prayed for mesne profits in the plaint but coming later with an application for ascertainment of mesne profits We are concerned with a case where the preliminary decree itself has provided for ascertainment of mesne profits The decision in *Arunachala Mudali* v. *Maragathammal*[2], was in a case which fell under Order 20, rule 12, Civil Procedure Code, and what this Court decided there was that in such a case where there was no prayer in the plaint for mesne profits it was not open to the plaintiff subsequently to ask for ascertainment of mesne profits and for that purpose the preliminary decree being reopened and mesne profits being provided for It is well-settled that there can be more than one preliminary and more than one final decree It was observed by a Bench of this Court in the decision in *Kasi* v *Ramanatha Chettiar*[3], as follows :

> " If it be a misnomer to call a decree ' final' and to say that it could be followed by another final decree in the suit, it is a misnomer sanctioned by the Legislature, for the provision that a decree ' may be partly preliminary ' and partly 'final ' implies that further proceedings have to be taken to be followed by another final decree completely disposing of the suit No doubt ordinarily there would be one preliminary decree followed by one final decree in suits of the kind mentioned in Order 20, rules 12 to 18. . .... but no inference, can, in our opinion, be drawn from the general language used that the Code does not contemplate, and the Court has in consequence no power, even in special cases involving a multiplicity of claims or other complication to pass more than one preliminary decree or one final decree."

As was held in the Full Bench decision above referred to, unless the plaintiff's prayer for mesne profits had been specifically considered and refused, it was open to the Court to entertain a subsequent application for mesne profits, after passing of the preliminary decree and before the passing of the final decree. I should say that in this case where the preliminary decree provides for ascertainment of mesne profits and the final decree does not provide for mesne profits, it would be open to this Court to pass another final decree after ascertainment of mesne profits. A suit can not be said to have been finally disposed of until all the prayers in the plaint have either been granted or specifically refused In the present case the preliminary decree having provided for ascertainment of mesne profits and (the final decree) not having provided for mesne profits, it is open to the Court to ascertain it and pass another final decree. There is nothing to prevent such a course being adopted by the Court. I cannot accept the argument on behalf of the respondent that because the final decree already passed does not provide for mesne profits should be deemed to have been refused The matter was never under consideration at the stage of the earlier final decree The view of the lower appellate Court is therefore wrong and the order of the trial Court will be restored. The respondent will pay the appellant's costs Leave granted.

S.V J. *Second appeal allowed ;*
Leave granted.

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1. (1951) 2 M L J 176 I L.R (1952) Mad. 173.
2. (1954) 2 M L J 696
3. (1947) 2 M.L J. 523, 526

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE K. SRINIVASAN AND MR JUSTICE R SADASIVAM.

Minor Sivaraman and others .. *Appellants**

v.

P. M Shanmughasundara Mudaliar and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 103—Obstruction to the execution of the order of eviction—Application for removal—Summary dismissal—Failure to file the suit within a year under Order 21, rule 103—Suit for recovery of damages for use and occupation of suit house—Reliance on—Suit, if maintainable—Recitals in the settlement deed—Properties covered by it—If self-acquired properties of the settlor.

The plaintiffs in the present case filed an eviction petition against one *P*, treating him as a tenant in one of the suit properties and got an *ex parte* order for eviction. They were obstructed by defendants 2 and 3, when they attempted to take delivery of the house in execution of the order of eviction, and their application for removal of obstruction and delivery was dismissed The plaintiffs did not file a suit within one year as required under Order 21, rule 103, Civil Procedure Code They, however, relied on the fact that the present suit was pending at the time when the summary order in the eviction proceeding was passed The present suit is not for a declaration of title and possession of the suit properties, but only for damages for use and occupation for the period 3rd September, 1956 to 3rd September, 1959.

Is the suit maintainable ?

Held, that the terms of Order 21, rule 103, Civil Procedure Code, are quite clear that the summary order is conclusive subject to the result of a suit filed within a year. There is nothing in this rule to show that it requires an unsuccessful party only to establish his right within a year. It only requires that the unsuccessful party should file a suit within a year to establish the right claimed It would be adding to the rule to state that the summary order would be conclusive subject to result of a pending suit, if a decision of a competent Court in a pending suit is obtained within one year. Order 21, rule 103 does not at all refer to the necessity of obtaining a decree of a Court within one year, as what all it requires is the filing of a suit within one year Hence, the fact that the plaintiffs had obtained a decision in their favour in the lower Court in a suit which was pending at the time when the summary order was passed, cannot affect the applicability of principle contained in Order 21, rule 103 The summary orders have become conclusive by reason of the failure on the part of the plaintiffs and their predecessor-in-title to file appropriate suits within one year.

Held, also that, it is not possible to find solely on the strength of the statement in the settlement deed that the properties covered by it are the self-acquired properties of the settlor. But there are several other circumstances in this case which support the recitals in the deed of settlement that the properties covered by it were self-acquired properties.

Under the deed, the settlor has given absolute interest in the properties covered by it to *K* It is true, one of the terms of the settlement deed is that, *K* should maintain the settlor during his lifetime. But there is no power of revocation in the deed. Whatever cause of action the settlor might have to recover maintenance from *K*, he had no right to cancel the settlement deed.

Appeals and Memorandum of Objections against the decrees of the Court of the Subordinate Judge of Erode, dated 1st April, 1961 in Original Suit No. 27 of 1960 (O P No. 46 of 1959).

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* Appeal Nos 244 of 1961 and 572 of 1962 and Memorandum of Cross-objections in A S. No 244 of 1961. 30th August, 1967.

R. Gopalaswami Ayyangar and *M Srinivasan*, for Appellants

T. R Srinivasan and *T Shanmugham*, for Respondents.

The Judgment of the Court was delivered by

Sadasivam, J—The suit properties consisting of two houses bearing door Nos. 4 and 5, South Hanumantharayar Koil Street, Erode, were purchased by one Karuppuswami Mudaliar, who died in 1944 The said Karuppuswami Mudaliar had two sons, Sivaraman and Samiappa Sivaraman predeceased Karuppuswami in 1939 leaving his widow Karuppayee and three sons, Palaniappa, Shanmugham and Vyapuri - The other son Samiappa, the first defendant in the suit, married Kaveriammal as his first wife and through her he had a daughter Perianayaki *alias* Gnanambal, who is the second plaintiff in the suit, the first plaintiff being the husband of the said second plaintiff. Dhanalakshmi, the third defendant, is the second wife of Samiappa and the second defendant Sivaraman is the minor son of Samiappa through Dhanalakshmi Karuppuswami Mudaliar executed a settlement deed Exhibit A-2 dated 4th February, 1940 in favour of Kaveriammal in respect of the suit properties and two other properties describing them as his self-acquired properties He has mentioned in the settlement deed that as his son Samiappa was ill-treating him and not maintaining him, he had executed the settlement deed giving the suit properties and other properties absolutely to K[illegible]ammal, but subject to the condition that she should maintain him during [illegible]-time But even on 6th September, 1940 Karuppuswami executed the cancellation deed, a registration copy of which has been marked as Exhibit B-2, on the ground that he was not maintained properly and that he desired to have the earlier settlement deed Exhibit A-2 revoked. Kaveriammal who had conveyed the properties under Exhibit B-3 dated 17th June, 1940 in favour of her maternal uncle Marimuthu Mudaliar got back the properties under the settlement deed Exhibit B-5 on 26th May, 1943 On 27th February, 1956, she executed a settlement deed Exhibit A-1 in favour of the plaintiffs, namely, her son-in-law and daughter. It is on the strength of this settlement deed the plaintiffs have filed the suit to recover Rs 10,800 as damages for use and occupation for three years from 3rd September, 1956 to 3rd September, 1959, from the defendants. The plaintiffs did not sue for possession of the two houses on the ground that they had filed R C O P No. 116 of 1958 on the file of the District Munsif's Court, Erode, against the tenant for possession

The contention of the defendant is that the suit properties were not the separate properties of Karuppuswami Mudaliar, but were his joint family properties, that Karuppuswami Mudaliar had no right to execute the settlement deed in favour of Kaveriammal, that there was a partition between Samiappa and his nephews, that as Samiappa was not mentally sound the suit properties were managed by the third defendant on behalf of her husband and her son Sivaraman by letting out to tenants and that the eviction proceedings taken by the plaintiffs against one Perianna Goundan as though he was a tenant are not valid Even Kaveriammal had filed petitions for eviction in respect of houses bearing door Nos 4, and 5, South Hanumantharayar Koil Street, Erode. Her eviction petition in respect of the house bearing door No. 5 was dismissed in H.R C No 179 of 1949 on 8th April, 1950 on the ground that she had no title to the property. Her petition for e iction in respect of the house bearing door No 4 ended in her favour in H.R C No 10 of 1949. But her application for delivery in pursuance of th eviction order was not successful as she was obstructed by the third defendant and the petition filed by her for removal of obstruction and delivery was dismissed. The plaintiffs themselves filed R C O P. No. 116 of 1958 against one Perianna Goundan treating him as a tenant in respect of premises No. 5, South Hanumantharayar Koil Street, Erode, and obtained an *ex parte* order of eviction and attempted to take delivery through Court, but they were obstructed by defendants 2 and 3 The petition filed by the plaintiffs for removal of obstruction and delivery was dismissed. The contention of the defendant is

that the suit is not maintainable, not having been filed within the period of limitation specified in respect of orders made in execution proceedings.

The learned Subordinate Judge overruled the contentions of the defendants and decreed the suit for damages at the rate of Rs 97 per month Defendants 2 and 3 have preferred Appeal No. 244 of 1961, and the first defendant has filed Appeal No. 572 of 1962 against the decree passed against them and the plaintiffs have filed a memorandum of cross-objections in Appeal No. 244 of 1961 claiming that the trial Court ought to have decreed Rs 200 per month as damages for use and occupation.

Sri M S Venkatarama Iyer, appearing for defendants 2 and 3 urged three points before us, namely, that the suit properties are joint family properties of Karuppuswami Mudaliar and his sons, that even if Karuppuswami Mudaliar was absolutely entitled to the suit properties, the settlement deed Exhibit A-2 has been validly revoked by Karuppuswami for non-fulfilment of the condition subsequent in the document that the suit is not maintainable inasmuch as Kaveriammal and the plaintiffs have not filed suits within one year to set aside the summary orders made under Order 21, rule 99, Civil Procedure Code, as required under Order 21, rule 103, Civil Procedure Code Sri M S Venkatarama Iyer also wanted to argue that the defendants had acquired title to the suit properties by adverse possession, but he was unable to point out any plea in the pleadings, or any issue, to justify his raising such an argument.

Sri M S Venkatarama Iyer appearing for defendants 2 and 3 referred to paragraph 12 of the judgment of the learned Subordinate Judge in which it is stated that she learned Advocate for the plaintiffs placed sole reliance on the recitals in the tettlement deed Exhibit A-2 that the suit properties are the self-acquired properties of Karuppuswami Mudaliar and criticised the finding of the Subordinate Judge that he was inclined to agree with the contention as there was no reason why Karuppuswami Mudaliar should introduce false recitals in a document executed twenty years prior to the case He urged, on the strength of the decision in *Ramrati Kuer* v *Dwarika Prasad*[1], that the statement in Exhibit A-2 is not admissible, and in any case, no value should be attached to it. In the said case, there was a recital in the gift deed of 1953 that the donor got the properties from her husband It is not stated in that decision that the statement is inadmissible in evidence Such statements are admissible under section 13 of the Evidence Act, though the value to be attached to the statement would depend upon the facts and circumstances of each case. But the statement in the gift deed was held to be of no value in the above case as the donor, who was not alive at the time of the litigation, had made a statement several years earlier in 1925 that her husband predeceased her father-in-law, and that this earlier statement of 1925 was admissible under section 32 (3) of the Indian Evidence Act and it was entitled to great weight as it was made at a time when there was no trouble whatsoever in the family

It is true that the statement of Karuppuswami in Exhibit A-2 that the properties covered by it are his self-acquired properties is a self-serving statement and it is not possible to find solely on the strength of this statement that the properties covered by it were his self-acquired properties But there are several other circumstances in this case which have been referred to by the learned Subordinate Judge in other portions of his judgment and they clearly support the recitals in Exhibit A-2. Though Karuppuswami executed Exhibit A-2 in 1940, the first defendant did not protest or take any action in respect of the same. Kaveriammal filed O S No. 120 of 1945, on the file of the District Munsiff's Court, Erode, against her husband Samiappa and Karuppayee, the brother's widow of Samiappa. Samiappa was insane at that time and he was represented by his brother's son Palaniappa in that suit Karuppayee was given up in that suit and Kaveriammal got an *ex parte* decree against her husband for Rs. 2,000, being the value of the house covered by the settlement deed Exhibit A-2 which was demolished and removed by her husband and Karuppayee.

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1 (1967) 2 S C J. 789 (1967) 1 S.C.R 153. A I R. 1967 S C 1134 at 1140

Thus, on the strength of the settlement deed, Kaveriammal got a decree against her husband, as evidenced by Exhibit A-4. In execution of the decree, she attached certain amount in the Erode Urban Bank on the ground that the amount belonged to her husband But the brother's sons of her husband filed a claim on the ground that in a partition between them and the first defendant herein, evidenced by a registered document dated 16th May, 1946, the amount fell to their share. But it is clear from the order Exhibit A-5 that the partition deed was brought about two months after the decree only with the intention to defraud the decree-holder Kaveriammal, and at any rate, to delay the execution and realisation of the decree, and the claim was dismissed If really the properties covered by Exhibit A-2 were joint family properties of Karuppuswami, it is unlikely that the brother's sons of the first defendant would have kept quiet Subsequently, Kaveriammal filed O S No. 20 of 1947, on the file of the District Munsif's Court, Erode, against her husband Samiappa, her husband's brother's son Palaniappa and Karuppayee It is true she exonerated Palaniappa and Karuppayee. But she got a decree against her husband Samiappa for arrears of rent in respect of the houses covered by Exhibit A-2 The contention of defendants 2 and 3 that Samiappa was insane and was not represented by any guardian in O S No 20 of 1947 has been rightly rejected by the learned Subordinate Judge. There is nothing to show that Samiappa continued to be insane when the suit O S No 20 of 1947 was instituted on the file of the District Munsif's Court, Erode, though he was no doubt, treated as insane at the time of the earlier suit In fact, according to defendants 2 and 3, there was a registered partition deed dated 16th May, 1946 between Samiappa and his brother's sons. It should be noted that the said registered partition was subsequent to the earlier suit O S No. 120 of 1945, on the file of the District Munsiff's Court, Erode, and prior to O S No 20 of 1947, on the file of the same Court Apart from these proceedings, there is one other strong circumstance, which clearly supports the case of the plaintiff's. Samiappa was arrested and sent to civil jail in execution of the decree obtained by his first wife, Kaveriammal But his second wife Dhanalakshmi Ammal, her brothers and her father joined together and told Samiappa that they would not give a single pie to Kaveriammal and that he might go to jail. The grievance of Samiappa was that his second wife Dhanalakshmi Ammal did not help him, though she was in possession of his properties and the properties covered by the settlement deed Samiappa filed a counter, Exhibit A-11, in the claim petition by his second wife Dhanalakshmi Ammal mentioning the above facts and admitting that he had to pay the arrears of rent in respect of the house properties covered by the settlement deed executed by his father in 1940 to his first wife Kaveriammal. It should be noted that the third defendant Dhanalakshmi Ammal claims to be in possession of the suit properties only on behalf of her husband Samiappa Hence in the face of the admission of Samiappa in Exhibit A-11, the third defendant cannot claim the suit properties on his behalf It is true that it is open to the second defendant as the grandson of Karuppuswami Mudaliar to put forward a claim that the suit properties are joint family properties But the suit properties were really purchased by Karuppuswami. Mr. M S. Venkatarama Iyer urged that the suit properties were purchased from out of the income of the Press run in the name of Sivaraman. The mere fact that Karuppuswami conducted a Press in the name of his eldest don Sivaraman would not make the Press a joint family property In fact, the evidence of Dhanalakshmi Ammal is that the Press belonged to Karuppuswami. Thus the above facts clearly justify the conclusion of the learned Subordinate Judge that the suit properties are the self-acquired properties of Karuppuswami and that he was competent to execute the settlement deed Exhibit A-2

There is no substance in the contention that the settlement deed Exhibit A-2 was executed by Karuppuswami in favour of Kaveriammal on condition that she should maintain him and hence Karuppuswami was entitled to revoke the settlement deed on the failure of Kaveriammal to maintain him. Under Exhibit A-2 Karuppuswami Mudaliar has given absolute interest in the properties covered by it to Kaveri-

ammal. It is true one of the terms of the settlement deed is that Kaveriammal should maintain Karuppuswami during his lifetime But there is no power of revocation in the settlement deed Exhibit A-2 Whatever cause of action Karuppuswami might have had to recover maintenance from Kaveriammal, he had no right to cancel the settlement deed Exhibit A-2. Hence the revocation of the settlement deed by Karuppuswami is invalid

The third and last contention urged by Sri M S Venkataraama Iyer is a substantial one and, in our opinion, it has to be accepted Under Order 21, rule 103, Civil Procedure Code :

> " Any party not being a judgment-debtor against whom an order is made under rule 98, rule 99 or rule 101 may institute a suit to establish the right which he claims to the present possession of the property, but, subject to the result of such suit (if any), the order shall be conclusive "

Kaveriammal did not file a suit within one year after the order Exhibit B-80 when her application to remove the obstruction caused by the third defendant, Dhanalakshmi Ammal, and deliver the house bearing door No 4, South Hanumantharayar Koil Street, Erode, in pursuance of the order in H R C. No 10 of 1949 on the file of the District Munsif's Court, Erode, was dismissed. Instead of taking steps to vacate the order, Kaveriammal merely settled the properties in favour of her daughter and son-in-law Even the plaintiffs (who claim under Kaveriammal) filed an eviction petition against one Perianna Goundan treating him as a tenant in the premises No. 5, South Hanumantharayar Koil Street, Erode, and got an *ex parte* order for eviction in R.C O P No 116 of 1958, on the file of the District Munsif's Court, Erode, they were obstructed by defendants 2 and 3, when they attempted to take delivery of the house in execution of the order of eviction, and their application for removal of obstruction and delivery was dismissed The plaintiffs did not file a suit within one year as required under Order 21, rule 103, Civil Procedure Code. They, however, relied on the fact that the present suit was pending at the time when the order Exhibit B-78 was passed

In *Seethamma* v *Kotareddi*[1], a Full Bench of this High Court has held that the provisions of Order 21, rule 63, Civil Procedure Code, are mandatory and the decision in a claim petition is final unless the party aggrieved takes the course indicated in the rule by instituting a suit to supersede it within a year It has been further held that the specific provisions of Order 21, rule 63 override the more general principle enunciated in section 11, Civil Procedure Code. In that case, the decree-holder in O S No 527 of 1930, on the file of the District Munsif's Court, Ellore, attached certain properties and brought them to sale. But the mother of the judgment-debtor preferred a claim in respect of some of the properties on the ground that she had obtained a maintenance decree with a charge over those properties. But even four days prior to the claim petition filed by the mother of the judgment-debtor, the decree-holder filed O S. No. 231 of 1936, on the file of the District Munsif's Court, Ellore, representing the general body of creditors for a declaration that the charge decree obtained by the mother of the judgment-debtor was collusive and not binding on the creditors and that the property already purchased was not liable for her maintenance The claim petition was dismissed on the representation of the decree-holder that he had already filed the Original Suit No. 231 of 1936, on the file of the District Munsif's Court, Ellore The mother of the judgment-debtor succeeded in establishing the validity of her charge decree when O.S No. 231 of 1936 went up to the High Court But when she filed an execution application for enforcing the maintenance decree, the auction-purchasers filed O.S No. 91 of 1943 for a declaration that she cannot execute her decree as she had not filed a suit within one year for setting aside the order dismissing her claim, and this contention was accepted by the Full Bench

1. (1949) 1 M L.J 593 : I.L.R (1950) Mad 101 (F.B).

In *Kaleswar Mills Ltd* v *Govindaswami*[1], the decision in *Akkammal* v. *Komaraswamy Chetty*[2], affirmed later in the above Full Bench was followed and it was held that the claim in that suit was barred as against the obstructors by reason of the provisions of Order 21, rule 103, Civil Procedure Code. It was pointed out in this decision that though the Division Bench case in *Akkammal* v. *Komaraswamy Chetty*[2] dealt with the effect of Order 21, rule 63, Civil Procedure Code, on principle, what was laid down in that Bench decision would also govern the case under consideration as the procedure indicated by the Code is the same, and Order 21, rule 103, Civil Procedure Code, corresponds to Order 21, rule 63, Civil Procedure Code

Two earlier single Judge's decisions of this Court, taking a contrary view, were not referred to, or discussed, in the Full Bench decision In *Palaniappa* v. *Ramaswami*[3], Venkataramana Rao, J, has held that the institution of a suit under Order 21, rule 103, Civil Procedure Code, is not the only remedy against the order under Order 21, rule 98, Civil Procedure Code, and that the rule only contemplates the establishment of a right to the property to supersede the order. He has held that if such a right is established within a year, the order must be held to have been superseded and that it is not necessary to institute a suit within one year. He observed that the policy underlying Order 21, rule 103, Civil Procedure Code, is to have a speedy settlement of the questions of title raised on execution sales and that what makes the order conclusive under Order 21, rule 103 is not the failure to institute a suit, but the failure to have the right established In *Umanath* v. *Pedru Souza*[4], Govindarajachari, J, has relied on the above decision of Venkataramana Rao, J, and held that where a suit or an appeal already filed by the claimant is pending at the time when an order under Order 21, rule 98, Civil Procedure Code, dismissing his claim is made, it is not obligatory on his part to file another suit under Order 21, rule 103, Civil Procedure Code, within one year of the order under Order 21, rule 98, Civil Procedure Code, and that in such a case, the order is subject to the decision in the suit or appeal pending at the time. But these decisions should be deemed to have been overruled by the Full Bench decision, which has considered the principles governing the question There is nothing in Order 21, rule 103, Civil Procedure Code, to show that it requires an unsuccessful party only to establish his right within a year It only requires that the unsuccessful party should file a suit within a year to establish the right claimed

Sri T R. Srinivasan, appearing for the plaintiff's, brought to our notice the decision in *Gopiram* v *Sewantilal*[5], which relied on the above decisions in *Palaniappa* v. *Ramaswami*[3], and *Umanath* v. *Pedru Souza*[4], and distinguished the decision in *Abdul Rahim Rowther* v *Swaminatha Odayar*[6], which followed the Full Bench decision in *Seethamma* v *Kotareddi*[7], and held that a suit to set aside a summary order under Order 21, rule 103, Civil Procedure Code, was maintainable in spite of the fact that there was a pending suit for the same relief when the summary order was passed. It has been held in the above Calcutta decision that if a competent Court gives a decision in a pending suit within a year of the passing of the summary order, the decision must be accepted as valid because the time limit for challenging the summary order has not yet run out and the party in whose favour the order is made in the summary proceeding cannot get any advantage of it, the summary order not having attained finality Having regard to the Full Bench decision, the above Calcutta decision cannot be accepted Further, the reasons given in the Calcutta decision to distinguish the decision in *Abdul Rahim Rowther* v. *Swaminatha Odayar*[6] are hardly convincing and several anomalies would arise if the principle of that

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1 (1945) 2 M L J 403 I L R (1946) Mad 536

2 (1942) 2 M L J 315 I L R (1943) Mad 40

3 (1937) 1 M L J 667 A I R 1937 Mad 582

4. (1949) 1 M L J 286 A.I R 1950 Mad 19.

5 A I R 1960 Cal 580

6 (1955) 1 M L J 322 . I L R. (1955) Mad 741

7 (1949) 1 M L J 593 I L R (1950) Mad. 101 (F B)

decision is followed The terms of Order 21, rule 103, Civil Procedure Code, are quite clear that the summary order is conclusive subject to the result of a suit filed within a year. It would be adding to the rule to state that the summary order would be conclusive subject to the result of a pending suit, if a decision of a competent Court in a pending suit is obtained within one year Order 21, rule 103, does not at all refer to the necessity of obtaining a decree of a Court within one year, as what all it requires is the filing of a suit within one year It was held in the Calcutta decision that the summary order was superseded by the decree passed by the trial Court in a pending suit within a year But it does not state as to what would happen if the decree of the trial Court is taken up in appeal, or second appeal, and if the summary order is relied on by the other party, as in the case before us, and in other cases in which the principle of the Full Bench decision had been applied The Calcutta decision would lead to the anomalous result that a party who gets a decree in a pending suit within 365 days in an ordinary year and 366 days in a leap year could rely on that decision to supersede the summary order, but he would fail if he obtains such a decree even one day late through no fault on his part It is a well known principle that an act of Court shall prejudice no man, based on the maxim *actus curiae neminem gravabit* Hence, a person who has obtained a decision in a pending suit even after one year can legitimately contend that the delay in obtaining the decision was due to no fault on his part, but due to the delay on the part of the Court in making the decision and hence the decision in the pending suit, though made after an year of the summary order, would supersede the summary order We are, therefore, unable to accept the principle of the Calcutta decision following the decisions of single Judges of this Court, which are contrary to the Full Bench decision, which affirmed the earlier Bench decision in *Akkammal* v *Komaraswamy Chettiar*[1]. Hence the fact that the plaintiffs had obtained a decision in their favour in the lower Court in a suit which was pending at the time when the summary order was passed, cannot affect the applicability of the principle of the Full Bench decision to the facts of this case The orders, B-78 and B-80, have become conclusive by reason of the failure on the part of the plaintiffs, and their predecessor-in-title Kaveriammal, to file appropriate suits within one year

Sri T R Srinivasan, appearing for the plaintiffs, urged that the third defendant Dhanalakshmi Ammal did not set up title in herself, but only that of the joint family of her husband, that as Samiappa was not a party to the summary orders, they would not bind him and that the summary orders could not affect the rights of the defendants It is true as pointed out in *Venkata Ramiah Chetty* v *Chinna Pulliah*[2], the decision under Order 21, rule 103, Civil Procedure Code, becomes conclusive only as between the parties, unless displaced by the result of a suit to be instituted by the party against whom the order is made within a period of one year, and that persons who are not parties to the summary order cannot be affected by the order. It is clear from the summary orders in this case that the Court found that the third defendant Dhanalakshmi Ammal was in possession of the suit properties not on her own account, but on account of the joint family of her husband and son The summary orders negatived the claim of the plaintiffs that they are entitled to possession by virtue of the settlement deed relied on by them, which proceeded on the basis that the properties are the self-acquired properties of Karuppuswami If the orders, Exhibits B-78 and B-80, have become conclusive as against the plaintiffs only so far as the parties, namely, defendants 2 and 3, are concerned, the plaintiffs can have no relief by way of damages for use and occupation as against them. It is true that the first defendant was not a party to the summary orders and they will not bind him But for the prior litigations, the plaintiffs can have no remedy as against the first defendant, even if the summary orders are not conclusive, as they

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1. (1942) 2 M.L J 315 I.L.R (1943) Mad. 40.
2. (1949) 2 M L J 466

can be taken as pieces of evidence which negatived the basis of the plaintiffs' claim.

The plaintiffs obtained an eviction order on the ground that Perianna Goundan was their tenant and they filed an application under Order 21, rule 97, Civil Procedure Code, only to remove the obstruction caused by Dhanalakshmi Ammal But the averments in the plaint filed earlier are totally different and contradictory. It is stated in the plaint that Kaveriammal executed a settlement deed in favour of the plaintiffs and put them in possession of the properties covered by the document and that defendants 2 and 3, at the instigation of the first defendant, or of their own accord, assaulted the plaintiffs and trespassed into the suit houses. The second defendant is a minor It is stated that the third defendant acted on behalf of the second defendant Thus even according to the averments in the plaint, it is defendants 2 and 3 who are in wrongful possession of the two houses bearing door Nos 4 and 5, South Hanumantharayar Koil Street, Erode. We have already referred to the fact that in spite of the adverse order Exhibit B-78 Kaveriammal did not file a suit within one year to set aside the order, but executed the settlement deed, Exhibit A-1, in favour of the plaintiffs In this evidence the second plaintiff stated that he took possession of the suit properties ten or fifteen days after Exhibit A-1, but the defendants beat him and threw him out of possession The present suit is not for a declaration of title and possession of the suit properties, but only for damages for use and occupation for the period 3rd September, 1956 to 3rd September, 1959 Thus the plaintiffs have no consistent case whether they were in possession of the suit houses through tenants, or whether the defendants, or defendants 2 and 3 alone are in unlawful possession of the same We have already referred to the counter affidavit Exhibit A-11 filed by Samiappa in E A. No 1193 of 1957 in E P R No 1879 of 1957 in O S No 20 of 1947 stating that his wife Dhanalakshmi Ammal, with the help of her brothers and father, took all the immoveable properties and sent him to jail Thus, ther is no satisfactory evidence that the first defendant Samiappa had possession of the suit properties. There can be no doubt that the third defendant alone had possession of the suit properties and she claimed that she was in such possession on behalf of the joint family of her husband and son and this claim has been upheld by the District Munsif's Court, Erode, in the two summary orders, Exhibits B-78 and B-80 The plaintiffs cannot, therefore, claim any damages for use and occupation from any of the defendants, as the first defendant has not been proved to have been in occupation of the suit properties and the possession of the third defendant was on behalf of the joint family of her husband and son It is unnecessary to express any opinion in this appeal as to how far the orders Exhibit B-78 and B-80 could be used against the first defendant in a regular suit for title and possession, having regard to the decisions in the prior suits, O S No 120 of 1945 and O S No 20 of 1947, on the file of the District Munsif's Court, Erode, inasmuch as the first defendant was not a party to the summary orders

In the result, Appeal No 244 of 1961 is allowed with costs and the suit filed by the plaintiffs is dismissed with costs Counsel's fee one set The other appeal filed by the first defendant, Appeal No 572 of 1962, is also allowed, but without costs The memorandum of objections filed by the plaintiffs *in forma pauperis* for a larger amount of damages necessarily fails and is dismissed, but in the circumstances we make no order as to costs The plaintiffs should pay the Court-fee due to Government in the suit and in the cross-objections

V M K. *Appeal allowed and suit dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE A ALAGIRISWAMI

Gnanamurthi and others *Petitioners**

Penal Code (XLV of 1860), section 147—Acquittal of 19 out of 22 charged under section 147—Conviction of the remaining three—Conviction, if sustainable.

In the present case, even though only 22 persons were charged before the trial Court and 19 of them were acquitted, it was legally open to the trial Court and the lower appellate Court to find that not merely those 22 persons but a number of other persons were also involved in the commission of the offence with which the accused before the Court were charged, and if it had been so found, the fact that 19 persons have been acquitted and only three have been convicted would not mean that there is any legal objection to such a conviction But in this case, neither the trial Court nor the lower appellate Court found that a number of others in addition to the 22 people before the Court were members of the unlawful assembly. In the absence of such a finding, it is not possible to hold that there were other persons, who, along with the three convicted, could be said to have formed the unlawful assembly There is nothing here to show that there were other persons who were either absconding or could not be identified and therefore unnamed and they together with the convicted accused would have constituted an unlawful assembly, In the absence of such evidence the three petitioners are entitled to be acquitted.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898 praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Pudukkottai dated 3rd March, 1966, and passed in C.A No. 6 of 1966 (C C No. 1363 of 1965 on the file of the Court of the Sub-Magistrate (J) Keeranur).

S. Sethuratnam, for Petitioners.

Calvin Jacob, for the Public Prosecutor, for State.

The Court made the following

ORDER —The three petitioners before this Court were tried along with 19 others before the learned Sub-Magistrate, Keeranur, for offences under sections 147 and 225 read with 149, Indian Penal Code 19 of the 22 were acquitted. The petitioners alone were convicted, under sections 147 and 225, Indian Penal Code, and sentenced to rigorous imprisonment for three months under each count, the sentences to run concurrently On appeal before the learned Sub-Divisional Magistrate, Pudukkottai, the conviction under section 147, Indian Penal Code, against the petitioners was confirmed and the conviction under section 225, Indian Penal Code ,was set aside and the petitioners were sentenced to pay a fine of Rs 200 each, in default to undergo rigorous imprisonment for two months.

It is urged on behalf of the petitioner that three persons alone cannot form members of an unlawful assembly and as the prosecution case as well as the charge was that only 22 persons before the Court were members of an unlawful assembly and as 19 of them have been acquitted, it should be held that the 19 persons who were acquitted were not there, with the consequence that the three remaining persons cannot be held to be members of an unlawful assembly On behalf of the petitioners reliance is placed upon the decision in *Kartar Singh* v. *State of Punjab*[1], where it was observed as follows :

"If the Courts below could legally find that the actual number of members in the appellant's party were more than 5, the appellant's party will constitute an unlawful assembly even when only three persons have been convicted. It

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* Cr R C No 1086 of 1966 and
Cr R P No 1066 of 1966. 8th December, 1967

1. (1962) 2 S C R. 395 · (1963) 1 S C J 298 · (1963) M L J. (Crl.) 175 A I R 1961 S C 1787.

is only when the number of the alleged assailants is definite and all of them are named, and the number of persons found to be proved to have taken part in the incident is less than 5, that it cannot be held that the assailants' party must have consisted of 5 or more persons The acquittal of the remaining named persons must mean that they were not in the incident The fact that they were named, excludes the possibility of other persons to be in the appellant's party and especially when there be no occasion to think that the witnesses naming all the accused could have committed mistakes in recognising them "

But this very case has been referred to in the subsequent decision of the Supreme Court in *Mohan Singh* v. *State of Punjab*[1], where in paragraph 12 at page 180 their Lordships have referred to this case and have observed as follows

> " We, however, think that it would be unreasonable to read this statement as laying down an unqualified proposition that whenever persons named in the charge are alleged to constitute an unlawful assembly it is legally not permissible to the prosecution to prove during the trial that persons in addition to those named in the charge also were members of the said assembly. In other words, what this observation intends to suggest is that where persons named in the charge are alleged to compose an unlawful assembly the Court of facts would be slow to come to the conclusion that persons other that those named in the charge were members of the said assembly If, however, it appears on evidence that persons not so named in the charge were members of the unlawful assembly, there is no legal bar which prevents the Courts from reaching that conclusion. This can and does arise where some of the persons composing the unlawful assembly are not identified by the witnesses and they are not named. In fact the decision in the case of Kartar Singh itself shows that this Court rejected the appellant's contention that their conviction under sections 302 and 307 read with section 149 was valid. Therefore, we see no inconsistency between the observations made in this case and the earlier decision to which we have just referred "

The decision in *Mohan Singh* v. *State of Punjab*[1] is in paragraph 9 at page 178, which is as follows:

> " In dealing with the question as to the applicability of section 149 in such cases it is necessary to bear in mind the several categories of cases which come before the criminal Courts for their decision If five or more persons are named in the charge as composing an unlawful assembly and evidence adduced by the prosecution proves that charge against all of them, that is a very clear case where section 149 can be invoked It is, however, not necessary that five or more persons must be convicted before a charge under section 149 can be successfully brought home to any members of the unlawful assembly. It may be that less than five persons may be charged and convicted under section 302/149 if the charge is that the persons before the Court along with others named constituted an unlawful assembly; the other persons so named may not be available for trial along with their companions for the reason, for instance, that they have absconded. In such a case, the fact that less than five persons are before the Court does not make section 149 inapplicable for the simple reason that both the charge and the evidence seek to prove that the persons before the Court and others number more than five in all and as such, they together constitute an unlawful assembly. Therefore, in order to bring home a charge under section 149, it is not necessary that five or more persons must necessarily be brought before the Court and convicted Similarly, less than five persons may be charged under section 149, if the prosecution case is that the persons before the Court and others numbering in all more than five composed an unlawful assembly, these others being persons not identified and so not named In such a case, if evidence shows that the persons before the Court along with unidentified and unnamed assailants or members composed an unlawful assembly, those before the Court can be convicted under section 149 though the unnamed and unidentified persons

1. (1962) 3 S C R. (Supp) 848 : A I R 1963 S C 174.

are not traced and charged Cases may also arise where in the charge the prosecution names five or more persons and alleges that they constituted an unlawful assembly In such cases if both the charge and the evidence are confined to the persons named in the charge and out of the persons so named two or more are acquitted, leaving before the Court less than five persons to be tried, then section 149 cannot be invoked. Even in such cases it is possible that though the charge names five or more persons as composing an unlawful assembly, evidence may nevertheless show that the unlawful assembly consisted of some other persons as well who were not identified and so not named In such cases, either the trial Court or even the High Court in appeal may be able to come to the conclusion that the acquittal of some of the persons named in the charge and tried will not necessarily displace the charge under section 149 because along with the two or three persons convicted were others who composed the unlawful assembly but who have not been identified and so have not been named In such cases, the acquittal of one or more persons named in the charge does not affect the validity of the charge under section 149 because on the evidence the Court of facts is able to reach the conclusion that the persons composing the unlawful assembly nevertheless were five or more than five It is true that in the last category of cases the Court will have to be very careful in reaching the said conclusion But there is no legal bar which prevents the Court from reaching such a conclusion. The failure to refer in the charge to other members of the unlawful assembly unnamed and unidentified may conceivably raise the point as to whether prejudice would be caused to the persons before the Court by reason of the fact that the charge did not indicate that unnamed persons also were members of the unlawful assembly But apart from the question of such prejudice which may have to be carefully considered, there is no legal bar preventing the Court of facts from holding that though the charge specified only 5 or more persons the unlawful assembly in fact consisted of other persons who were not named and identified That appears to be the true legal position in respect of the several categories of cases which may fall to be tried when a charge under section 149 is framed."

The observations would also apply to cases under section 147 It, therefore, follows that in this case even though only 22 persons were charged before the trial Court and 19 of them were acquitted, it was legally open to the trial Court and the lower appellate Court to find that not merely those 22 persons but a number of other persons were also involved in the commission of the offence with which the accused before the Court were charged, and if it had been so found, the fact that 19 persons have been acquitted and only three have been convicted would not mean that there is any legal objection to such a conviction But in this case neither the trial Court nor the lower appellate Court found, as a matter of fact, that a number of others in addition to the 22 people before the Court were members of the unlawful assembly In the absence of such a finding, it is not possible, to hold that there were other persons who, along with the three convicted, could be said to have formed the unlawful assembly There is nothing here to show that there were other persons who were either absconding or could not be identified and therefore unnamed and they together with the convicted accused would have constituted an unlawful assembly In the absence of such evidence and such a finding, the petitioners are entitled to succeed.

The Revision Petition is allowed. The conviction and sentence of fine imposed on the petitioners are set aside The fine amounts, if already paid, will be refunded.

V.M.K. *Revision Petition allowed*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE T RAMAPRASADA RAO

A Punna Rao .. *Petitioner**

v.

R. Krishnan .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10 (3) (a) (iii) (c) *Proviso—Scope, applicability and interpretation of*

The Controller has to apply the prescribed statutory formula not only in cases when he decides to reject but also in cases when he decides to allow There cannot be one formula in the case of rejection and another in the case when he decides to allow The word 'reject' appearing in the Proviso is compendiously used so as to take into its fold the expression 'allow' as well, and ought not to be restricted literally to the word 'reject' as it appears there If a literal interpretation of the word 'reject' has to be adopted, then the purpose and the intendment of the beneficial legislation, namely, to protect the tenants who are likely to suffer hardship, would be ignored and indeed would not be considered at all Having regard to the essence of the benefit that the Legislature intended to confer on tenants from unreasonable evictions in the hands of the landlord, the Legislature has made this proviso

Petition under section 25 of Act XVIII of 1960 praying the High Court to revise the order of the Small Cause Court, Madras, in H R A No 555 of 1966— H R C No 74 of 1966, Rent Controller, Madras

P. Anandan Nair, for Petitioner

R Mathurbhutham and *T S. Sundaresa Ayyar*, for Respondent

The Court delivered the following

JUDGMENT —The tenant is the petitioner in this Civil Revision Petition An interesting question has arisen in this petition regarding the interpretation of the First Proviso to section 10 (3) (*iii*) (*c*) of the Madras Buildings (Lease and Rent Control) Act, 1960 (Madras Act XVIII of 1960) Section 10 (3) (*a*) (iii) (*c*) deals with the right of a landlord to apply to the Rent Controller for an order directing the tenant occupying any portion of the building in which he is himself an occupant to put him in possession thereof if he requires additional accommodation for residential purposes or for purposes of business which he is carrying or as the case may be The section also makes it clear that the occupancy of the landlord may be either for residential or non-residential purposes and it provides him with the right notwithstanding anything contained in section 10 (3) (*a*) The proviso to section 10 (3) (iii) (*c*) runs as follows

> " Provided that, in the case of an application under clause (*c*), the Controller shall reject the application if he is satisfied that the hardship which may be caused to the tenant by granting it will outweigh the advantage to the landlord "

The short facts of this case are :—The respondent filed an application under the above section for directions before the Rent Controller to the petitioner herein for possession of a portion of the building in which the petitioner is carrying on a coffee business It is not in dispute that the respondent is carrying on in the very same premises electrical business of his own It is for purposes of expanding his electrical business apparently he sought for directions as above. The Rent Controller was satisfied that the requirement was genuine, but observed as follows:

> " I am satisfied that the advantages that will accrue to the petitioner will outweigh the possible difficulty that will be suffered by the respondent, if eviction is ordered "

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* C.R P. No. 302 of 1967. 8th January, 1968.

The appellate authority who heard the appeal of the petitioner did not advert himself to this aspect at all, but considered the question whether the requirement was genuine and concluded that the finding of the Rent Controller is justified. Against the order of the Appellate Authority the present Civil Revision Petition is filed.

Mr. Anandan Nair, learned Counsel for the petitioner, after inviting my attention to the opinion expressed by the Rent Controller in so far as it relates to the finding that is required in law under the proviso to section 10 (3) (*a*) (iii) (*c*), contends that the learned Rent Controller has not correctly appreciated the formula laid down by the Legislature while considering the application under the above section According to him the *sine qua non* in such an application is that there should be complete subjective satisfaction that the hardship which may be caused to the tenant by granting eviction will outweigh the advantage to the landlord In the instant case, the Rent Controller found that the advantage that will accrue to the landlord will outweigh the hardship that is likely to be caused to the tenant This is a reversal of the legal requirement not only according to the intendment of the legislative provision but also in accordance with the common understanding of expressions used therein Learned Counsel for the respondent, however, would state that the formula as it appears now in the proviso would apply only in cases where the Controller makes up his mind to reject the application and therefore in cases where the application is to be allowed by the Rent Controller the formula is not applicable.

I am unable to agree with the learned Counsel for the respondent that the prescribed formula has to be invoked only in cases when the Controller decides to reject the application *i e*, in a case where the Court dedides to reject the application after it makes up its mind that it cannot be allowed It has to consider whether the application has to be allowed in the first instance and thereafter consider whether it has to be rejected The word "reject" appearing in the proviso is compendiously used, in my view, so as to take into its fold the expression "allow" as well and ought not to be restricted literally to the word "reject" as it appears there. If a literal interpretation of the word "reject" has to be adopted, then the purpose and intendment of the beneficial legislation, namely, to protect the tenants who are likely to suffer hardship, would be ignored and indeed would not be considered at all. Having regard to the essence of the benefit that the Legislature intended to confer on tenants from unreasonable evictions in the hands of the landlord, the Legislature has made this proviso Laws have to be adopted to those cases which most frequently occur This is not only a cannon of construction of statutes law, but also a principle of the common law. Viewing and reading the purpose and the content of the language of the proviso, I am of the view that the controller has to apply the prescribed statutory formula as above not only in cases when he decides to reject but also in cases when he decides to allow There cannot be one formula in the case of rejection and another in the case when he decides to allow This will lead to the authorities concerned reading the section in a manner in which it ought not to be.

Thus viewed, it appears to me that the Rent Controller has misapplied the formula and has not given a finding whether he has satisfied that the hardship which may be caused to the tenant by granting eviction will outweigh the advantage to the landlord.

The other aspect is that when the petitioner took up the matter before the Appellate Authority, the latter did not advert to this important submission said to have been made before him and has not even found one way or the other as the Rent Controller did. There is certainly a lacuna and the appellate order bristles with an error apparent on the face of the record. In the concepts of views it is absolutely essential that the Appellate Authority ought to have adverted to these circumstances and found applying the statutory formula, whether the hardship which may be caused to the petitioner by granting eviction will outweigh the

advantage to the landlord In the absence of a finding one way or the other, this Court is unable to apply the mind to the facts of the case, and it is unnecessary for this Court to embark upon an enquiry and find at this stage whether and what ought to be the correct finding in the circumstances of this case. It has therefore, become necessary for me to remit the subject for are consideration by the Appellate Authority in the light of the observations made as above. The order of the Appellate Authority is, therefore, set aside, and the matter remitted to his file for afresh disposal on its merits.

Learned Counsel for the respondent, however states that the petitioner has not paid rents for nearly eight months and a direction may be given to the petitioner to pay up the arrears of rent before the next hearing before the Appellate Authority. Mr. Anandan Nair also feels that this request is reasonable, and therefore I further direct that if the tenant (petitioner) pays up the entire arrears before the next hearing of the case by the Appellate Authority, this order of mine will stand Otherwise this Civil Revision Petition will be deemed to have been dismissed. No costs.

S.V J. ——— *Petition allowed and remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

Royal Arts, Big Bazaar, Coimbatore, by Managing Partner, G. Manickavel .. *Petitioner**

v.

State of Madras, represented by its Secretary, Home Department, Madras and another .. *Respondents.*

Madras Cinemas (Regulation) Act (IX of 1955)—*Rules under—Condition No.* 16 *added to licence in Form ' C ' prescribing upper limit for the fees to be charged by licensee for use of cycle-stand in cinema theatres— Validity.*

The part of Condition No. 16 added, by the State Government by amending the rules under the Madras Cinemas (Regulation) Act, to the conditions of the licence in Form ' C ' granted to cinema exhibitors, which prescribes that the fee collected from the users of cycle-stand in cinema theatres should not exceed 5 nP. per cycle, is beyond the jurisdiction of the rule-making authority of the Government and has to be struck down as *ultra vires*. The impugned provision itself states that what is to be collected from the users of the cycle-stand is a fee. In that event, the licensee can correlate the quantum of the fee to the actual expenses incurred for providing the amenity. Therefore to prescribe an invariable maximum for the fee, without taking into account the actual expenditure that the licensee may have to incur for providing the service or amenity in question will be entirely *ultra vires* and illegal.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the 2nd respondent, the Collector of Coimbatore to forbear from enforcing the Condition No. 16 in Form " C " of the Rules framed under the Madras Cinemas (Regulation) Act, 1955.

G. Ramaswamy, for Petitioner.

S. T Ramalingam, for the Government Pleader, for Respondents.

The Court made the following

ORDER.—The point raised for decision in this writ petition is a short one. The petitioner is a licensee licensed to run cinema exhibitions in a theatre in

* W.P. No. 3352 of 1965. 22nd March, 1968.

Coimbatore In his cinema theatre he had put up a cycle-stand. This cycle-stand is leased to one Muthuswami On an average about 1,500 cycles used to be parked per month during the shows The lessee used to employ three boys on a salary of Rs. 60 each per month for looking after the cycles and he was charging 10 nP. per cycle for parking in the cycle-stand. While the affairs stood thus, the first respondent, State Government of Madras, issued an order in G O.Ms No. 2508, Home, dated 7th August, 1963 amending the rules, under the Madras Cinema (Regulation) Act By this amended rules, a further Condition, No. 16 was added to the previous conditions of the licence in Form 'C' granted to the cinema exhibitors:

> "16. The licensee shall provide a suitable cycle-stand for all cycles that may reasonably be expected and appoint a caretaker to look after the cycles The licensee may collect a fee not exceeding five naye paise for each cycle kept in the cycle stand"

In pursuance of the above amended rule, the petitioner was informed that his lessee should not collect at the rate of 10 nP per cycle in the cycle-stand and if he were to do so, the second respondent, the licensing authority would take disciplinary action against the petitioner.

It is contended by the petitioner that itwas entirely outside the jurisdiction of the authorities whether it be the Government or the licensing authority, to prescribe for the charges which the petitioner should levy on the users of this cinema hall whether it be for the value of the tickets purchased by the people who come there to witness the shows or for the license fee charged to those people who have come to witness the shows and who feel the necessity of parking their cycles outside the theatre and for that purpose use the stand which the management has provided. Just as in the case of levy of charges for the tickets for witnessing shows, for which the proprietor has full discretion, he will also have a similar discretion in the matter of levying charges for the use of the amenity of cycle-stand which he has provided. For the first mentioned proposition that the levy of charges for witnessing cinema shows is entirely within the discretion of the licensee and cannot be interfered with by any rule which may be issued by the licensing authority, learned Counsel for the petitioner refers to an unreported decision of Veeraswami, J., in *M/s. Universal Theatre, Tiruppur* v. *The Collector of Coimbatore, etc* [1], where the learned Judge struck down as illegal an order by which the licensing authority directed a cinema licensee to charge the same rate for people occupying the benches as they were theretofore charging those occupying the bare floor for witnessing the shows But in the present case, apart, from the principle laid down in the decision above cited, the impugned order itself states that what is to be collected from the users of the cycle-stand is a fee for such user In that event, the licensee can correlate the quantum of the fee to the actual expenses incurred for providing amenities. That will again depend upon the salary he pays to the caretakers and any other expenses like lighting, cost of the upkeep of the stands and so on and provided at the cycle-stand Therefore, to prescribe an invariable maximum for the fee, without taking into account the actual expenditure that the licensee may have to incur for providing the service or amenity in question will be entirely *ultra vires* and illegal Therefore, I have no doubt that the rule mentioned above providing for an upper limit for the fees to be collected from the users of the cycle-stand was beyond the jurisdiction of the rule-making authority Hence, that part of the rule which prescribes that the fee collected from the users of the cycle-stand should not exceed 5 nP. for each cycle is struck down as *ultra vires* and beyond the competency of the rule-making authority. No order as to costs

V.K. *Petition allowed.*

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1. W.P. Nos. 174, 198 and 199 of 1960.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN

S. V. Athimoola Mudaliar .. *Petitioner**

v.

The Commissioner, Corporation of Madras, Ripon Buildings, Madras-3, and another .. *Respondents.*

Madras Town Planning Act (VII of 1920), *section* 25 (2) *and rule* 59 *of the rules—Betterment contribution—Notice of demand for payment—Form of notice—If in compliance with the requirements of the Act and the Rules*

On the question whether the form of notice of demand for payment of betterment contribution under the provisions of the Madras Town Planning Act, (Act VII of 1920), is in compliance with the requirements of the Act and the Rules made thereunder *Held* that, the minimum right which is clearly a valuable right conferred under section 25 (2) of the Act on the assessees to betterment contribution, is to receive a notice of a proposed assessment to betterment contribution before there is an actual assessment and with liberty for them to object to the proposed assessment and to appeal in respect thereof The requirements of the statute, and in particular, section 25 read with rule 59 of the Rules made thereunder, have not been complied with, when the respondents (Corporation authorities) proceeded to issue a final demand notice for the payment of betterment levy against the petitioner, without a prior show cause notice and without giving an opportunity to make representations contra and to file an appeal or file a revision as the case may be against any adverse decision.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the Assistant Engineer, Town Planning, Works Department, Corporation of Madras, Madras-3 in W D C. No. G 15/16328/64, dated 25th November, 1964 and quash the same.

K. C. Rajappa, for Petitioners.

T. Chengalvarayan, for Respondent.

The Court made the following

ORDER.—This writ petition under Article 226 of the Constitution for the issue of a writ of *certiorari* is directed against a notice dated 25th November, 1964 of demand for payment of betterment contribution under the provisions of the Madras Town Planning Act (VII of 1920), issued to the petitioner by the second respondent, the Assistant Engineer, Town Planning, Works Department, Corporation of Madras The first respondent in the writ petition is the Commissioner, Corporation of Madras, Ripon Buildings, Madras.

The impugned notice is a brief one and reads thus·

" It is noticed that you are the owner of a piece of land bearing R.S No. 3754/38 pt of Mylapore included in the Western Section Area Town Planning Scheme sanctioned by the Government. This is to bring to your notice that the foregoing property is liable to " Betterment Contribution " under the provisions of the Town Planning Act and the Rules framed thereunder The liability for betterment contribution decided by the Arbitrator " is final and binding on all persons " at this stage Under section 25 expounded in the Town Planning Act, betterment contribution comes in as a first charge on the property on which it is due and the owner for the time being, who is entitled to receive the benefits of the

* W P. No 3468 of 1965 5th April, 1968.

property is liable to discharge this liability. As such you being the present owner are liable to pay the amount of betterment contribution due in respect of the plot owned by you.

As per the resolution of the Council, Corporation of Madras, dated 3rd August, 1954 the owners of properties which abut on private scheme roads in Mylapore Western Section Area Town Planning Scheme have to pay at a rate of Rs 90 per ground as betterment contribution and in the case of other owners of properties abutting on scheme roads formed by the Corporation in the area have to pay at a rate of Rs. 940 per ground for their respective extents held liable to betterment contribution.

The total amount payable by you at the rate of Rs. 940 per ground for an extent of 1 ground 1915 sq ft. possessed by you works out to Rs. 1,689-90.

You are therefore requested to arrange for the payment of the said amount and get your property discharged from this liability "

The grounds of the petitioner's objections, to the notice are catalogued under five heads in paragraph 17 of the affidavit. I do not propose to repeat all those grounds in this writ petition because of my conclusion that the form of the notice itself is not in compliance with the requirements of the Act and the Rules made thereunder and that it is necessary for the second respondent to issue a proper notice, in which event, the petitioner would have an opportunity to urge before the appropriate authorities the grounds of objection to the validity of the notice which he has set out in paragraph 17 of his affidavit.

The crucial provision of the Act which the impugned notice seems to offend is section 25 (2) of the Act, which is in the following terms :

" (*a*) The State Government may make rules for the assessment and collection of the betterment contribution, and subject to such rules, (*i*) the chairman shall have the same powers and shall adopt the same procedure for the assessment and collection of the betterment contribution as he has for the assessment and collection of the property tax; (*ii*) persons affected shall have the same right to receive notice of assessment and to object to the assessment and to appeal in respect thereof as they have in respect of the property tax, and (*iii*) decisions on appeal shall to the same extent be final and conclusive; and (*b*) lands and buildings exempt from the property tax shall also be exempt from any betterment contribution."

The minimum right which is clearly a valuable right thus conferred by the Act on the assessees to betterment contribution, is to receive a notice of a proposed assessment to betterment contribution before there is an actual assessment and with liberty for them to object to the proposed assessment and to appeal in respect thereof These rights are the same which an assessee to property tax is conferred under the Madras City Municipal Act That such a right has to be given to the assessees under the Town Planning Act is also the view which has been expressed by a Bench of this Court in *Corporation of Madras* v *Balakrishna Mehta*[1], where an exhaustive discussion of the provisions of the Madras Town Planning Act is found. At page 405 of the report, the Bench has observed that the persons affected shall have the same right to receive notice of assessment and to object to the assessment and to appeal in respect thereof as they have in respect of assessees in the case of property tax Reference is made by the learned Counsel for the petitioner to the Rules which the State Government have framed under section 25, and in particular to rule 59, which says that the notice given to the owners of the properties shall be in Form 22-A. Form 22-A appended to the Rules gives the assessee a right to file a revision petition to the Commissioner of the Corporation of Madras within 60 days from the date of service of notice. But, unfortunately, in the present case, the assessee has not been given any pre-assessment notice as required under the Rules and his

1. (1953) 1 M L J 403

complaint is that for the first time he has been required to meet a demand for payment of the betterment contribution assessed on him as per the impugned demand notice dated 25th November, 1964 That is the main reason why he prays in the writ petition for the striking down of the notice as *ultra vires* and illegal under Article 226 of the Constitution.

In the counter-affidavit filed by the Corporation, there is a reference to the prior history of the betterment levy in this particular area of the Madras City. What I am able to gather from this counter-affidavit is that when the scheme was first promulgated for levying betterment contribution from house owners a writ petition was filed by an owner whose property abutted a private scheme road, W P. No. 195 of 1953, and the decision in that writ petition had been followed for the purpose of claiming the betterment levy in the present case A reference to the judgment in the writ petition shows that it is a decision on the basis of a compromise, stating that property owners whose property abuts a private scheme road will pay Rs. 90 as betterment contribution to the Corporation That decision did not deal with owners of property abutting Corporation scheme roads The petitioner falls in this latter category In this case the counter-affidavit states that the Corporation had worked out the total for the cost of acquiring the Corporation scheme roads and amenities and added there to the value of lands required for private scheme roads and the cost of providing amenities thereon, and the total cost thus arrived at has been rateably distributed over the entire area and in this manner a figure of Rs 940 per ground has been arrived at as the amount of betterment contribution to be collected from the owners of lands abutting the scheme roads formed by the Corporation of Madras. The only exception to this proposal is that persons whose property abuts the private scheme roads need pay only Rs. 90 as decided in the W. P. No. 195 of 1953 . I do not wish to say anything in this writ petition about the method of calculation that has been adopted above by the Corporation, which may anticipate or affect any decision which the Corporation may give if the petitioner or any other party, make representations against the demand for betterment levy on property abutting Corporation scheme roads Any representation in this respect will have to be dealt with by the appropriate authorities of the Corporation, as and when objections are filed by the aggrieved parties But it will suffice to say for the disposal of the present writ petition, that *prima facie*, the requirements of the statute, and in particular, section 25 read with rule 59 of the Rules made thereunder, have not been complied with, when the respondents proceeded to issue a final demand notice for the payment of betterment levy against the petitioner, without a prior show cause notice and without giving an opportunity to make representations contra and also to file an appeal or file a revision as the case may be against any adverse decision.

I, therefore, quash the impugned notice by a writ of *certiorari*. It will be open to the respondents to give prior notice under the Rules to the petitioner of the imposition of the betterment contribution and an opportunity for making representation contra This Writ Petition is allowed with the above observations. No order as to costs.

V M.K. *Writ petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT :—MR JUSTICE P. RAMAKRISHNAN.

N. Rajendran .. *Petitioner**

v.

The Revenue Divisional and Land Acquisition Officer, Sivakasi, Ramanathapuram .. *Respondent.*

Land Acquisition Act (I of 1894), section 18—Land acquisition proceedings—Award—Quantum of compensation—Party aggrieved making application to the Collector for reference to the Court—Certificate of posting showing two covers addressed to the Revenue Divisional Officer—Presumption under section 114 of the Evidence Act (I of 1872)—If could be drawn as to due compliance with the requirements of section 18.

The petitioner whose lands had been acquired for the construction of Government Hospital, received the notice of awards under section 12 (2) of the Land Acquisition Act. It was said that within the period of six weeks' time from the date of receipt of these notices, the petitioner, as a party aggrieved with the quantum of compensation, prepared application to the Land Acquisition Officer for making reference to the Court under section 18 of the Act and sent them by post He also obtained a certificate of posting from the village postmaster. The certificate of posting shows that the two covers respectively addressed to the Revenue Divisional Officer and Land Acquisition Officer were posted on the date as alleged by the petitioner.

Could a legitimate presumption be drawn under section 114 of the Evidence Act to the effect that the petitioner duly made the applications for reference under section 18 of the Land Acquisition Act?

Held, that before the presumption could be drawn there must be proof that the letter had been actually posted *Aburubammal* v *Official Assignee*, 45 M L J. 817 : (1924) I.L R 47 Mad. 215. No doubt, the instructions contained on the reverse of the certificate of posting form state that there is no guarantee of the nature of the contents of the communication for which the certificate is issued But in the present case, putting the context of the land acquisition proceedings which preceded immediately before and the name of the addressee as Revenue Divisional Officer noted on the two covers posted on the same date (but within the six weeks' time as required), the inference is that the letters have reference to the awards passed on the same date in the two cases and that what he had posted under certificate of posting was the originals of the application for reference under section 18, a copy of which he sent subsequently by registered post There was no specific denial of the receipt of the letters by ordinary post Further, the Collector himself had *suo motu* made a reference to the Court under section 30 to settle a dispute about apportionment of compensation This reference was also pending In the context of these proceedings, it is very likely that the petitioner also applied on the same date, but within the time, as he claims and he is therefore entitled to the presumption that in normal course of things, the applications must have reached their destination through post, namely, the Revenue Divisional Officer.

Petitions under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavits filed therewith the High Court will be pleased to issue writs of *mandamus* directing the respondent in both the petitions to refer to the Sub-Court of Ramanathapuram at Madurai Award Nos 14 and 13 of 1963 respectively on his file

S Kothandarama Nayanar, for Petitioner

S. T Ramalingam, for the Government Pleader, for Respondent.

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* W.P Nos. 3570 and 3571 of 1965. 11th April, 1968.

The Court made the following

ORDER —These two writ petitions are filed by one N. Rajendran for the issue of writs of *mandamus* under Article 226 of the Constitution under circumstances which can be set down briefly as follows :—

The petitioner is the owner of certain lands situated in Allampatti Village and Kottaipatti Village, Virudhunagar, which were acquired for the construction of the Government Hospital at Virudhunagar Two awards were passed, Award Nos. 13 and 14 of 1963, on the same date, namely, 31st December, 1963 The petitioner received the notices dated 22nd February, 1964 of the awards under section 12 (2) of the Land Acquisition Act in both the cases on 24th February, 1964 Six weeks' time from the date of receipt of the notices is provided in the statute for a party aggrieved with the quantum of compensation to apply to the Collector to make a reference to the Court under section 18 of the Act The petitioner's strenuous contention in the affidavits in both the petitions is that he prepared such an application and sent it by post to the Land Acquisition Officer posting the letters at the Mallanginar branch post office, Mallanginar being the village where he is resident. He also obtained from the Branch postmaster of Mallanginar a certificate of posting. This certificate of posting contains the date seal of 12th March, 1964 and it also shows that the two covers respectively addressed to the Revenue Divisional Officer and Land Acquisition Officer, Sivakasi, were posted on that date The petitioner was under the impression that the reference would be taken on file But finding that no intimation of such taking on file was sent to him, he sent a letter by registered post on 1st January, 1965 to the Revenue Divisional Officer mentioning the fact of his having made the necessary application for reference on 12th March, 1964 and his obtaining a certificate of posting on that date from the branch post office After sometime, he was told by the Revenue Divisional Officer that his application for making a reference was belated and nothing could be done in the matter.

It is claimed by the learned Counsel appearing for the petitioner that a legitimate presumption should be drawn the presumption being one of fact under section 114 of the Evidence Act—from the circumstances of his having posted the applications for making a reference on 12th March, 1964 that he made the applications duly and in time to the Land Acquisition Officer for reference under section 18 of the Land Acquisition Act He urges that the authorities were in error in ignoring this presumption in the circumstances of this case, and in refusing to make a reference to the Court under section 18 of the Land Acquisition Act

Learned Counsel has referred in support of his contention mentioned above to several authorities including a decision of this Court in *Aburubammal* v. *Official Assignee*[1], *Hulas* v *Allahabad Bank*[2], *Babulal Talakchand* v *Purushottam Shridhar*[3], *Janno* v. *Gaja Singh*[4], *Dhanapati Debi* v *The Corporation of Calcutta*[5]. It is sufficient for our purpose to refer to the broad principle followed in such cases and which can be gathered from the observation of the Bench in *Aburubammal* v. *Official Assignee*[1], *viz* ,

"The evidence is that that letter was posted and it is quite clear that it was so posted because a certificate from the Post Office to that effect is produced before the Court It is suggested by the learned Judge that it is possible that that letter was not delivered to the insolvent and that it is possible that, although not delivered it did not come back to the dead letter office, through what the learned Judge speaks of as the vagaries of the Madras post ; but the insolvent was called as a witness and he did not deny the receipt of that letter, though it is true he was not asked whether he had received it or not, and I fail to see how the learned Judge was justified in coming to the conclusion on that evidence that it had not been received, because the presumption is that a letter which is proved to be posted and posted to the right address is in fact received by the recipient "

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1 (1924) 45 M L J 817 I L R 47 Mad. 215
2. A.I.R. 1958 Cal. 644.
3 I L R (1963) Bom 583
4. (1966) All L J 424
5. (1951) 55 Cal.W N. 751.

Adverting to the above principle, Sarkar in his book on evidence, in the commentaries under section 114 of the Evidence Act, *Illustration (F)* has laid stress that the presumption under that section does not arise unless there is proof of actual posting.

It is clear from the Bench decision above mentioned, that the same principle is also reiterated there namely that before the presumption could be drawn there must be proof that the letter had been actually posted The certificate issued by the post office, which is called a "certificate of posting" may be one of the items of proof in that connection When a letter is sent by registered post, then also the post office gives a certificate of posting, but it is in a different form In addition to the certificate of posting there was evidence in *Abuiubammal* v *Official Assignee*[1], cited above that the letter was actually posted, and the data adduced in that case were considered sufficient to prove actual posting. In such circumstances the presumption that the recipient duly received the letter would follow. The learned Judges also took into account the fact that the recipient, the insolvent, did not deny the receipt of the letter. So it was a case of the cumulative effect of all the facts including the certificate of posting, which must be examined to find out whether there was in fact proof of the posting of a letter with the alleged purport in the post office The conduct of the recipient also will become relevant thereafter, and taking all these into account, the Court can come to the conclusion that presumption of receipt of the communication must be drawn.

No doubt, the instructions contained on the reverse of the certificate of posting form state that there is no guarantee of the nature of the contents of the communication for which the certificate is issued But in the present case, one can put the context of the land acquisition proceedings which preceded immediately before, and the name of the addressee as Revenue Divisional Officer noted on the two covers posted on the same date, and infer that the letters have reference to the awards passed on the same date in the two cases. This context gives strong support to the contention of the petitioner that what he had posted under certificate of posting was the originals of the application for reference under section 18, a copy of which he sent when he sent a subsequent communication by registered post on 1st January, 1965. In the registered communication sent on 1st January, 1965 he had also referred to the fact of his sending the applications for reference by ordinary post under certificate of posting on 12th March, 1964 It is urged on behalf of the petitioner that in the reply sent to him by the department there was no specific denial of the receipt of the letters by ordinary post, but there was only a bare statement that his application was belated.

Further, the matter does not end with what I have stated above. A reference to the concerned file of the department which was supplied to me at the time of the hearing of the writ petitions, shows that on receipt of the communication dated 1st January, 1965 by registered post, the Revenue Divisional Officer addressed the branch postmaster at Mallanginar about the certificate of posting, and the branch postmaster of Mallanginar has given a categorical reply, which is found in the file, that in fact two letters under certificate of posting were posted in his branch post office on 12th March, 1963, "1963" being evidently a clerical mistake for "1964". The statement of the branch postmaster in this connection must be viewed as of great importance to show that in fact two letters were sent by the petitioner by post on 12th March, 1964. It is also stated that several other claimants in the same land acquisition proceedings had applied for enhancement of the compensation under section 18 of the Land Acquisition Act and their applications were pending at the time. Further, the Collector himself had *suo motu* made a reference to the Court under section 30 to settle a dispute about apportionment of compensation This reference was also pending. In the context of these proceedings it is very likely that the petitioner also applied on 12th March, 1964 as he claims and he is therefore entitled to the presumption that in the normal course of things, the applications must have reached their destination through post, namely, the Revenue Divisional Officer,

1. (1924) I.L.R. 47 Mad. 215. 45 M.L.J. 817.

to whom under the statute the reference has to be made for the purpose of subsequent reference to the Court under section 18 Taking these above circumstances into consideration, I am of the opinion that this is a case where the respondent a Revenue Divisional Officer and Land Acquisition Officer, Sivakasi, ought to have made the necessary reference under section 18 to the Court Consequently writs of *mandamus* will issue to the respondent in both the petitions as prayed for. No order as to costs

V.M.K. ——— *Writ Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

P. Duraiswami Udayar .. *Petitioner**

v.

State of Madras by Secretary to Government, Revenue Department, Fort St. George, Madras-9 and others .. *Respondents.*

Board's Standing Order 155 (12), *sub-paragraphs* (i) *and* (ii)—*Interpretation—Appointment of close relations (brothers-in-law) as village headmen of adjacent villages—If barred under Board's Standing Order* 155 (12) (ii).

Board's Standing Order 155 (12) (*i*) specifically lays down that the headman and karnam of a village should not be close relations ; Board's Standing Order 155 (12) (*ii*) is equally specific in laying down a bar against the appointment of close relations as village officers of adjacent villages In other words, Board's Standing Order 155 (12) (*ii*) expresses one policy that in the case of adjacent villages it will be inadvisable in the public interest to have close relations as village officers whether in the post of village headman or in the post of karnam. Board's Standing Order 155 (12) (*i*) expresses another policy, namely, that in the same village karnam and headman ought not to be closely related. Apparently, for a long number of years, it was treated as a matter of policy that as far as possible there should not be any tendency for village officers of adjacent villages to form groups linked together by close bonds of relationship. Viewed in this way, the authorities, namely, District Revenue Officer and the Board of Revenue cannot be considered to have acted erroneously in interpreting Board's Standing Order 155 (12) (*ii*) in the manner they did, as containing a provision for debarring related persons from holding the posts of village headmen in adjacent villages Here, their relationship is very close, namely, brothers-in-law, and the villages though they are different have this in common that they belong to the same group.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in the proceedings (1) of the third respondent in D. Dis 84164/62 (2) of the second respondent in B P Rt 4678/A and (3) of the first respondent in Memorandum No. 86526-V2/63-6 and quash the said orders in the respective proceedings dated 18th January, 1963, 17th August, 1963 and 20th November, 1964.

K. Venkataramani, for Petitioner

J. Kanakaraj, for the Government Pleader, for Respondents Nos. 1 to 3

P. Raghaviah, for Respondent No. 4

The Court made the following

ORDER :—Pudunaduvalur and Nochiam are two villages in Perambalur Taluk of the Tiruchirapalli district forming a single group and they have a common karnam but different headmen The headman of Pudunaduvalur died sometime in 1960,

* W P No 2073 of 1964 18th August, 1967.

and one Duraiswami Udayar was appointed on 7th September, 1962 by the Revenue Divisional Officer as the permanent headman of that village One of the rival applicants before the Revenue Divisional Officer for the appointment was one Kandaswami Udayar The Revenue Divisional Officer preferred Duraiswami Udayar for the appointment overlooking the claims of Kandaswami Udayar. Kandaswami Udayar appealed to the District Revenue Officer That officer considered that Duraiswami Udayar, the appointee of the Revenue Divisional Officer, was closely related to the village headman of Nochiam, who had married the two sisters of Duraiswami Udayar Board's Standing Order 155 (12) (*ii*) states that in areas to which the Act does not apply (Hereditary Village Officrs Act), the principles laid down in Board's Standing Order 155 (12) sub-paragraph (*i*) may be followed in regard to the appointment of village officers in adjacent villages and the appointing authority may, for reasons to be recorded in writing, overlook the claims of persons on the ground that they are closely related to village officers in adjacent villages to such a degree that their appointments is likely to interfere with the administration Sub-paragraph (1) of Board's Standing Order 155 (12) states that two offices cannot be held by the same person permanently and the principle that the headman and karnam should not be related closely to each other should be followed as far as is consistent with recognition of legal claims The District Revenue Officer construed Boards Standing Order 155 (12) (*ii*) as involving a prohibition against the appointment of near relatives as village officers of adjacent villages irrespective of whether the appointees happened to be headman or karnam In other words, whereas Board's Standing Order 155 (12) (*ii*) implied only a bar against the karnam and headman of the same village being inter-related, Board's Standing Order 155 (12) (*ii*) was construed as a further bar against the appointment of near relations as village officers of adjacent villages whether the appointment was of village headman or of village karnam The District Revenue Officer relied upon this interpretation of the rule for setting aside the appointment of the petitioner, Duraiswami Udayar He also relied on two other circumstances One is that Kandaswami Udayar, the fourth respondent herein, has more properties (worth Rs 25,000) as against the petitioner Duraiswami Udayar, who after his application had acquired by gift from his mother a property which was stated in the gift deed to be worth only Rs. 10,000 but according to the statement of the village karnam it was really worth Rs 19,000 and the under-valuation in the gift deed was made for purposes of payment of lesser stamp duty There was also the fact that Kandaswami Udayar was a younger man being 35 years whereas Duraiswami the petitioner was older being 45 years Against this order, a revision was filed by the petitioner to the Board of Revenue and the Board of Revenue confirmed the orders of the District Revenue Officer The petitioner has filed this writ petition in this Court under Article 226 of the Constitution seeking for the issue of a writ of *certiorari* quashing the above said orders.

The first contention of the learned Counsel for the petitioner is that the Revenue Divisional Officer, while preferring the petitioner, has given weight to his longer experience of two years in the post of headman, whereas the fourth respondent Kandaswami had no such experience at all The learned Counsel also contended that the bar regarding appointment of relations in Board's Standing Order 155 (12) (*i*) and (*ii*) would apply only to headman and karnam of the same village, of headman and headman of adjacent villages or karnam and karnam of adjacent villages, but it cannot be extended in the case of adjacent villages to both the officers of villages officers. Learned Counsel also stresses that Board's Standing Order 155 (12) (*ii*) regarding the bar against appointment of relations as village officers of adjacent villages should be construed as an extension of Board's Standing Order 155 (12) (*i*) and intended only to embody the principle that headman and karnam should not be close relations whether they are in the same village or in adjacent villages, but that principle should not be extended to imply a bar when it comes to headman of adjacent villages or karnams of adjacent villages I am of the opinion that there is nothing in Board's Standing Order 155 (12) (*ii*) which allows such a view being taken of that standing order Board's Standing Order 155 (12), (*i*) specifically lays down that the headman and karnam of a village should not

be close relations; Board's Standing Order 155 (12) (ii) is equally specific in laying down a bar against the appointment of close relations as village officers of adjacent villages. In other words, Board's Standing Order 155 (12) (ii) expresses one policy that in the case of adjacent villages it will be inadvisable in the public interest to have close relations as village officers whether in the post of village headman or in the post of karnam Board's Standing Order 155 (12) (i) expresses another policy, namely, that in the same village karnam and headman ought not to be closely related. It may be easy to find a justification for the view that the village headman and karnam in the same village should not be related because, for example in records relating to the collection of land revenue, or in making reports on encroachments or in making other reports after local enquiries both karnam and headman have to subscribe their signatures and if they are closely related, it may happen that one cannot function as an effective check on the other It may not be easy to spell out in the case of Board's Standing Order 155 (12) (ii) as to why there is a bar to the appointment of relations as village officers of adjacent villages irrespective of whether they are headmen or karnams But for a long number of years such a policy was followed by the authorities by ensuring that adjacent villages do not tend to come under the control of village officers who are related, evidently to avoid formation of groups of headmen or karnams who can assume influence over adjacent villages in the same neighbourhood. Apparently it was treated as a matter of policy that as far as possible there should not be any tendency for village officers of adjacent villages to form groups linked together by close bonds of relationship It is not proper for me in this writ proceeding to express an opinion as to whether such a policy should be upheld or deprecated But that policy has been recorded in the Board's Standing Orders and those orders have assumed validity for making selections to the posts of village officers by the revenue authorities who are charged with a duty in that respect. The Board's Standing Orders afford them the necessary guidance in that matter Viewed in this way, the authorities, namely, District Revenue Officer and the Board of Revenue cannot be considered to have acted erroneously in interpreting Board's Standing Order 155 (12) (ii) in the manner they did, as containing a provision for debarring related persons from holding the posts of village headman in adjacent villages. Here, their relationship is very close, namely brothers-in-law, and the villages though they are different have this in common that they belong to the same group There are also two other circumstances, namely, the disparity in their property qualification and the disparity in their age. Both the District Revenue Officer and the Board of Revenue have considered that these two circumstances, together with the bar of relationship, are sufficient to outweigh the experience of two years which the petitioner claims to have had in the office This again is a question for the authorities charged with the duty of making a proper selection to the post, to consider, and their decision, which appears to have been made *bona fide* and from a fair view of the relevant rules cannot be interfered with in writ proceedings. The writ petition is dismissed with costs Advocate's fee Rs 100 payable to the fourth respondent

V M K ——— *Writ petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE N. KRISHNASWAMI REDDY

Valaguru Asari . *Petitioner**

Prevention of Food Adulteration Act (XXXVII of 1954), *section* 16 (1) (b) *and* (c)—*Power of taking sample by the Food Inspector—Absence of proof of demand or communication of the intention to take sample—Effect.*

Section 16 (1) (*c*) of the Prevention of Food Adulteration Act deals with preventing the Food Inspector from exercising any other power conferred on him under the Act This clause deals generally, since a Food Inspector has got several powers

*Cr.R C No 85 of 1966·
Cr R P. No. 84 of 1966

9th September, 1967.

to exercise Though the power of taking sample is also one of the powers conferred on him under the Act, it is specially carved out from the other powers and specifically brought in clause (*b*) of section 16 (1) It is, therefore, necessary for the Prosecution to show that the person who prevented the Food Inspector from exercising his powers, knew, to bring him within the mischief of section 16 (1) (*b*), that the Food Inspector wanted to take sample from him. He may be made known either by a demand of sample or a communication of the intention to take sample by the Food Inspector. It must be strictly proved that the accused, knowing Food Inspector wanted to take sample, prevented the Food Inspector deliberately from taking such sample. There is no evidence in this case that the Food Inspector either expressed his intention to the petitioner that he was going to take sample or that he demanded the sample from the petitioner In the absence of such evidence the conviction under section 16 (1) (*b*) of the Act cannot be sustained.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Sessions Judge of the Court of Session, Tiruchirapalli Division, dated 17th July, 1965 and passed in C A. No. 92 of 1965 (C.C. No. 25 of 1965 on the file of the Court of the District Magistrate (Judicial), Tiruchirapalli).

N. Suryanarayanan, for *R. T. Goplalakrishnan*, for Petitioner

Calvin Jacob, for Public Prosecutor, for State.

The Court made the following

ORDER —The revision petitioner has been convicted under section 16 (1) (*b*) of the Prevention of Food Adulteration Act and sentenced to pay a fine of Rs. 100, in default to undergo simple imprisonment for two months by the District Magistrate, Tiruchirapalli. On appeal, the Sessions Judge, Tiruchirapalli confirmed the conviction and sentence. The following facts are not disputed before me:

The Food Inspector (P.W. 1) found the petitioner carrying milk in a chombu covered with a tumbler at about 8 A M on 13th March, 1965 in the outskirts of Manapparai. P.W. 1 called the petitioner for the purpose of taking sample milk when the petitioner was going at a distance of half a furlong from him. The petitioner poured the entire milk from the chombu in the paddy field, threw away the chombu and the tumbler and ran away. P W 1 seized the chombu and the tumbler and filed a complaint against the petitioner alleging that he prevented him from taking the sample.

It is contended by the learned Counsel appearing for the petitioner that the conviction under section 16 (1) (*b*) of the Prevention of Food Adulteration Act cannot be sustained for the reason that there was nothing to show from the evidence of the Food Inspector that he either demanded sample from the petitioner or that he expressed his intention to take sample from the petitioner There appears to be substance in the contention of the learned Counsel.

It is necessary, to appreciate the contention of the learned Counsel, to set out the relevant portions of section 16 of the Prevention of Food Adulteration Act.

"16 (1) If any person—

(*a*) ... .

(*b*) prevents a Food Inspector from taking a sample as authorised by this Act, or

(*c*) prevents a Food Inspector from exercising any other power conferred on him by or under this Act, or . ... he shall . be punishable .."

Section 16 (1) (*c*) deals with preventing the Food Inspector from exercising any other power conferred on him under the Act This clause deals generally, since a Food Inspector has got several powers to exercise. Though the power of taking sample is also one of the powers conferred on him under the Act, it is specially carved

out from the other powers and specifically brought in clause (*b*) of section 16 (1). It is, therefore, necessary for the prosecution to show that the person who prevented the Food Inspector from exercising his powers, knew, to bring him within the mischief of section 16 (1) (*b*), that the Food Inspector wanted to take sample from him He may be made known either by a demand of sample or a communication of the intention to take sample, by the Food Inspector. It must be strictly proved that the accused, knowing the Food Inspector wanted to take sample, prevented the Food Inspector deliberately from taking such sample. There is no evidence that the Food Inspector either expressed his intention to the petitioner that he was going to take sample or that he demanded the sample from the petitioner. In the absence of such evidence, the conviction under section 16 (1) (*b*) of the Act cannot be sustained. However, he would be liable under section 16 (1) (*c*) of the Act. The powers of the Food Inspector are enumerated in section 10 of the Act. Under section 10 clause (8), any Food Inspector may exercise the powers of a Police Officer under section 57 of the Code of Criminal Procedure. When the Food Inspector called the petitioner while he was taking milk with him, he had prevented the Food Inspector from coming to him and ascertaining his name and residence and other details, by his pouring the milk, throwing the chombu and tumbler and running away.

The learned Public Prosecutor contended that though the Food Inspector had not communicated his intention to take sample from the petitioner, he had stated on oath that he called the petitioner with the intention of taking sample from him and that this would suffice to bring him within section 16 (1) (*b*) of the Act. I am unable to agree with his contention. He relied upon the following decisions in support of his contention · *The Public Prosecutor* v. *Murugesan,*[1] *Municipal Board* v *Jhamman Lal*[2], *Perumal Konar, In re*[3], and *Nazim* v. *State*[4]

In the first three decisions, there was a demand of sample by the Food Inspector, in *The Public Prosecutor* v *Murugesan*[1], the maistry and a cooly of a Panchayat Board deputed by the Sanitary Inspector to take sample of milk asked the accused to give sample ; but the accused instead of giving a sample went into the hotel and handed over the milk to a servant who poured it into a milk pan containing other boiled milk. The conviction of the accused was upheld for having prevented the officer from taking the sample. In *Municipal Board* v *Jahmman Lal*[2], the Food Inspector asked the accused to give him as ample of mustard oil; but he left the shop promising to come shortly. The Food Inspector waited for sometime and the accused did not turn up The accused was prosecuted for having prevented the Food Inspector from taking the sample by abruptly leaving the shop without giving him the sample. The conviction was upheld. In *Perumal Konar, In re*[3], the Food Inspector stopped the person carrying milk and demanded sample for analysis ; but the accused instead of complying with the demand of the Officer placed the can inside the hotel, took to his heels and ran away The accused was prosecuted under both the clauses, 16 (1) (*b*) and 16 (1) (*c*) of the Act The conviction was upheld under both the clauses by Anantanarayanan, J , as he then was. Anantarayanan, J., held that the accused was clearly guilty of an offence under section 16 (1) (*c*) of the Act as the Food Inspector was prevented by the accused from exercising any other power conferred on him by or under the Act. The conviction under section 16 (1) (*b*) was also confirmed. In these three cases, it is clear that there was a demand for sample by the Food Inspector.

In this case, as already stated, there was no demand by the Food Inspector; nor had he expressed his intention to take sample Hence, these decisions do not support the contention of the learned Public Prosecutor

In *Nazim* v. *State*[4], the accused who was passing by the road with a bucket of milk in his hand was asked by the Food Inspector to stop but the accused instead of complying with the request took to his heals and when chased by the peon threw

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1. (1952) 1 M.L.J. 168.
2. A.I.R. 1961 All 103.
3. (1964) M L J. (Cr.l) 661.
4 A I.R 1957 All. 829.

away the milk from which the Food Inspector intended to take a sample. The accused in this case was charged under section 30 of the U P Pure Food Act and rule 4 framed under the said Act Section 30 of the U P Pure Food Act is substantially similar to that of section 16 (1) (*c*) of the Act. There is no provision in the U.P Pure Food Act similar to that of section 16 (1) (*b*) of the Act. Section 30 of the U.P Pure Food Act is as follows —

> " A person who wilfully obstructs any person acting in the performance of any duty under this Act or any rule, by-law order or warrant made or issued thereunder, shall be guilty of an offence ".

This decision may not be of any use for the contention of the learned Public Prosecutor as we are concerned in this case with section 16 (1) (*b*) of the Act This decision will, of course, have relevancy if the petitioner was prosecuted under section 16 (1) (*c*) of the Act.

As stated already, if the petitioner was prosecuted under section 16 (1) (*c*) of the Act, he would have been guilty of having prevented the officer from exercising his powers conferred on him by the Act I am not inclined to alter the conviction to section 16 (1) (*c*) of the Act as the complaint was not laid under the said section and opportunity to meet the charge under section 16 (1) (*c*) was not given to the petitioner by the trial Court.

The revision petition is allowed and the petitioner is acquitted Fine amount, if paid, will be refunded

V.M K. *Revision petition allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT —MR. JUSTICE P RAMAKRISHNAN.

AL. CT. Alagappa Chettiar, Hereditary Trustee of Sree Uchinathaswami Devasthanam Sivapuri, Chidambaram Taluk, South Arcot .. *Petitioner**

v.

The Revenue Divisional Officer, Chidambaram and another . *Respondents.*

Land Acquisition Act (I of 1894), section 4—" Public purpose "—Construction of staff quarters for a University—If a "public purpose" falling within the ambit of section 4.

The construction of staff quarters for a University is a " public purpose " falling within the ambit of section 4 of the Land Acquisition Act. The benefit thus conferred by the acquisition is on the teaching staff of the University who form a section of the public; however small it may be, they are still a defined section of the public, who happen to be at any given moment engaged in teaching the studnets of the University . The object of the acquisition is clearly to provide such teaching staff with quarters which are proximate to the University campus. In this sense the acquisition serves a public purpose, namely, the purpose of enabling the teaching staff to live in close proximity to the University campus and afford to them the necessary convenience Though the teachers for the time being may be benefitted by the acquisition, the benefit to the University by such acquisition as well as to the students studying in the institution, though remote is nevertheless real.

Where the acquisition is not for a company but for an educational institution, the proper way of construing the expression "public purpose" must be to take its as meaning in the general sense, and not in the restricted sense applicable to acquisitions for companies when the language used in section 40 (1) (*b*) of the Land

*W.P. No 2301 of 1965. 8th January, 1968.

Acqusition Act may have to be applied in the a manner laid down in *State of West Bengal* v. *P N Talukdar*, (1966) 1 S.C J. 28

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the respondents to forbear from proceeding with the land acquisition proceedings with regard to survey No. 217/1 0 58 cents and 217/2 1 03 acres of the total extent of 1 acre 61 cents in Tiruvakulam Village, Chidambaram Taluk, S Arcot district, belonging to Sree Uchinathaswami Devasthanam, Chidambaram, in pursuance of the notice of the 1st respondent under section 4 (1) and 5-*A* of the Land Acquisition Act, dated 25th April, 1965.

K E. Rajagopalachari, for Petitioner

S. T Ramalingam, for Government Pleader, for Respondents

The Court made the following

ORDER—The petitioner is the hereditary trustee of Sri Uchinathaswami Devasthanam, Sivapuri, Chidambaram Taluk, South Arcot district. The respondents are respectively the Revenue Divisional Officer, Chidambaram (Land Acquisition Officer) and the State of Madras, represented by the Secretary for Industries, Labour and Co-operation (Housing) Department. The facts that led up to the present writ petition are briefly the following .

The temple of which the petitioner is the hereditary trustee, owns several lands which include 1 acre 61 cents comprised in R. S Nos. 217/1, and 217/2 in Thiruvetkalam Village The petitioner alleged that following the procedure outlined in the Hindu Religious and Charitable Endowments Act, section 34, the petitioner on behalf of the temple with a view to augment the income of the temple for meeting its need, applied and got the permission of the authorities under the Act for dividing the said land into 17 plots and selling them in public auction as house sites. The Government also at the instance of the Commissioner, appointed under the Hindu Religious and Charitable Endowments Act, accorded such approval by a communication sent on 13th June, 1964. In pursuance of these proceedings under the Hindu Religious and Charitable Endowments Act the petitioner was able to sell in public auction held on 6th January, 1964, 17 plots for a sum of Rs 55,000 and the successful bidders paid one-third of the purchase money When the petitioner applied to the authorities under the Act for confirming the sale in favour of the respective bidders, some of the members of the staff of the Annamalai University who were not able to bid successfully at the auction sale, became disgruntled and made false representations and this led the first respondent to issue a notice under section 4 (1) and section 5-A of the Land Acquisition Act for the purpose of acquiring the abovesaid extent of land for a public purpose, namely, the construction of staff quarters for the Annamalai University In the meantime some of the purchasers at the auction had paid the balance of the purchase money but the sale deeds have not been executed in their favour by the petitioner because of the pendency of the acquisition proceedings

The petitioner alleged that the construction of staff quarters meant for the occupation of individual members of the staff of the Annamalai University cannot be held to be for a public purpose, as such members of the staff do not constitute a section of the public This apart, it was urged by the petitioner that after the Commissioner, Hindu Religious and Charitable Endowments, had accorded sanction for selling the same plots in public auction and after the Government had approved of that course, the resort to the provisions of the Land Acquisition Act for acquiring the very same lands at the instance of the University must be considered to be a misuse of power as well as a fraudulent and colourable exercise of such a power.

In the counter affidavit which was filed by the respondents, it was alleged that the proposal to initiate land acquisition proceedings in this case was taken up on the application of the Registrar of the Annamalai University based upon a resolu-

tion of the Syndicate of the University in March, 1964 The fact that prior to that application, the Department of the Government dealing with religious endowments had accorded sanction to the trustee to sell the lands in public auction under the provisions of section 34 of the Hindu Religious and Charitable Endowments Act, would not stand in the way of the Government approaching the question again for the purpose of the Land Acquisition Act and taking a decision to initiate land acquisition proceedings Such a step cannot be said to be a fraudulent and colourable exercise of power It was also urged in the counter affidavit that the construction of staff quarters for a University is a public purpose under the Act falling within the ambit of section 4 of the Land Acquisition Act.

There is no doubt a certain unfortunate feature in the present acquisition proceedings, in so far as the Government, having given sanction to the trustee for selling the land in public auction and thereby augmenting the income of the temple, had to change its mind soon after, at the instance of the University to give approval for the initiation of land acquisition proceedings in respect of the same land for the purpose of building staff quarters for the Annamalai University. But there is this redeeming feature, namely, that the people who have bid at the auction and made deposits of large amounts have not obtained sale deeds from the trustee of the temple and therefore there has been no actual transfer of title from the trustee to these people. Secondly, if at the time of passing the award in the land acquisition proceedings the price realised at the sale at private auction is also taken into consideration for determining the quantum of compensation, it cannot be held that the religious institution of which the petitioner is a trustee will stand to lose by the alteration of the procedure for disposal of the land by public auction, its proceedings for the acquisition of the land for the alleged purpose of erecting staff quarters for the University There is no basis therefore for the apprehension entertained by the petitioner that by changing the manner of disposal of the land by public auction into land acquisition proceedings at the instance of a body like the University, the petitioner-institution may stand to lose financially.

Learned Counsel for the petitioner, Sri K E. Rajagopalachari referred to a decision of the Suprme Court in *State of West Bengal* v. *P. N Talukdar*[1], for the view that acquisition for staff quarters for an institution like the present, will not be a public purpose to which the provisions of the Land Acquisition Act can be applied. He referred in particular to the observations in that judgment in paragraph 13 where the Supreme Court observed that while acquisition of land for putting up by a hostel building and a playground obviously meant for the students studying at an educational institution run by the Ramakrishna Mission at Calcutta, can be viewed as being directly useful to a section of the public, namely, the students of the institution, so far as staff quarters are concerned, they are meant for occupation by the individual members of the staff Therefore the Supreme Court declined to accept the argument that an individual member of the staff must also be held to be a section of the public, and that therefore staff quarters will be useful to the public. The Supreme Court also observed that if such a view is to be taken, it would reduce the idea of what is useful to or what is used by a section of the public, to absurdity.

The above decision was given in the context of section 40 (1) (*b*) of the Land Acqusition Act found in the Land Acquisition Manual, Part VII dealing with acquisition of land for companies In that section the Act has used the words " that acquisition is needed for the construction of some work, and that such work is likely to prove useful to the public ". The words " likely to prove useful to the public " found in that section are important, and we have to view the Supreme Court decision cited above as explaining the scope of these specific words, and not as dealing with the interpretation of the words " public purpose " found in section 4 (1) of the Act Admittedly this is not a case falling under Part VII dealing with acquisition of land for companies The Annamalai University is not a company. The respondent seeks to support the acquisition only under section 4 (1) as having been

1. (1966) 1 S C J. 28 A I R. 1965 S.C. 646 at p. 653.

made for a public purpose It is only when the acquisition is made under Part VII for a company, that one has to resort to the more restricted language used in section 40 (1) (*b*), namely, " likely to prove useful to the public " It is in this context of the restricted words thus employed in section 40 (1) (*b*), that the Supreme Court seems to have expressed the opinion that the use of the quarters proposed to be put up on the acquired land by the staff of the educational institution will not fall within the scope of section 40 (1) (*b*), which refers to the acquired land being likely to prove useful to the public When we have to interpret the word " public purpose" found in section 4 (1) of the Act the approach will have to be from a larger and more comprehensive angle, without being narrowed down to the restricted words used in section 40 (1) (*b*) That this should be the proper approach has been laid down by the Supreme Court in the decision in *R.K. Agarwalla* v *State of West Bengal*[1], where at page 999 the Supreme Court observed that the expression " public purpose " has been used in a generic sense including any purpose in which even a fraction of the community may be interested or by which it may be benefitted. The same decision observes that when " public purpose " has to be construed for the purpose of section 6, it has to be read in a restricted sense when the acquisition is for a company In the latter event the public purpose must be limited according to the restricted language used in Part VII of the Act. Consequently it appears to me that this is a case where the acquisition not being for a company but for an educational institution, namely, a University, the proper way of construing the expression, ' public purpose ' must be to take its meaning in the generic sense, and not in the restricted sense applicable to acquisition for companies when the language used in section 40 (1) (*b*) may have to be applied in the manner laid down in *State of West Bengal* v. *P. N Talukdar*[2]

On the other hand, there are a series of decisions which deal with the expression ' public purpose ' from the broader point of view mentioned above. Instances of such decisions are *State of Bihar* v. *Kameshwar Singh*[3], where at page 289 the Supreme Court has referred to the observations of the Judicial Committee in *Hamabai Framjee* v *Secretary of State*[4], where the Privy Council extracted with approval the judgment of Batchelor, J :

> " General definitions are, I think, rather to be avoided where the avoidance is possible and I make no attempt to define precisely the extent of the phrase 'public purposes ' in the lease; it is enough to say that in my opinion, the phrase whatever-else it may mean, must include a purpose, that is, an object or aim, in which the general interest of the community as opposed to the particular interest of individuals, is directly and vitally concerned "

The Supreme Court thereafter added

> " And it is well that no hard and fast definition was laid down for the concept of ' public purpose ' has been rapidly changing in all countries of the world. The reference in the above quotation to ' the general interest of the community ', however, clearly indicates that it is the presence of this element in an object or aim which transforms such object or aim into a public purpose ".

A Bench of this Court in *Vijrapuri* v *N. T C. Talkies Ltd.* [5], at page 113 has referred to several previous decisions including the Supreme Court decision just now referred to and laid down the following broad principles for understanding the scope of the expression ' public purpose '

> " .... an acquisition can be for a public purpose, even though all the members of the public do not take the benefit, but only a section of it takes the benefit ; public purpose in an acquisition may be served even though the acqui-

1. A I R 1965 S C. 995
2. (1966) 1 S C J. 28 A I.R. 1965 S C 646 at 653
3. (1952) S C J. 354 : (1952) S.C R 889 · A I R 1952 S.C 252
4. (1914) L R 42 I A 44 28 M L J. 179 (P C)
5. I L R. (1959) Mad 997 : (1959) 2 M L J. 469 A.I.R. 1960 Mad. 108

sition is for the benefit of particular members of the public, provided the object of acquisition advances a public purpose. In this category may be included advancement of public prosperity, public welfare and the convenience of the public ".

In the present case in the sale effected by the petitioner about 8 or 9 members of the University staff seem to have taken part and succeeded in making the highest bids for the plots. But the plots thus acquired would become their private property and will descend to their heirs and which they can alienate On the other hand the proposed acquisition will not benefit any specified number of individuals (who may happen to be teachers of the Annamalai University), in the sense that an absolute right is conferred on them to the houses which they can alienate or pass on to their descendants. The benefit thus conferred by the acquisition is on the teaching staff of the University who form a section of the public, however small it may be, they are still a defined section of the public, who happened to be at any given moment engaged in teaching the students of the University. The object of the acquisition is clearly to provide such teaching staff with quarters which are proximate to the University campus. The connected file which I perused shows that the Revenue Divisional Officer made a report that the lands in question are in close proximity to the University area and will therefore enable the teaching staff to go conveniently from their residence to the place of teaching In this sense the acquisition serves a public purpose, namely, the purpose of enabling the teaching staff to live in close proximity to the University campus, and afford to them the necessary convenience. Though the teachers for the time being may be benefitted by the acquisition, the benefit to the University by such acquisition as well as the students studying in the institution though remote is nevertheless real. In a decision of the Bombay High Court in *Municipal Corporation, Bombay* v *Ranchordas*[1], it was held that building of quarters for municipal servants must be held to be a measure likely to promote public convenience and the acquisition of lands for that purpose was held to fall within the scope of the Land Acquisition Act. I am therefore satisfied that the attack made on the present acquisition on the basis of the decision in *State of West Bengal* v. *P. N. Talukdar* [2], which was a decision exclusively confined Part VII of the Act cannot be supported. On the other hand the authorities support the view that a purpose of the present kind can be clearly viewed as a public purpose within the meaning of section 4 in the larger and more generic sense of that term.

I have already indicated that though there is what may appear to be a certain unfortunate feature in the acquisition, namely, giving up an approval given by one Department of the Government dealing with Religious Endowments for selling the lands in public auction and adopting the principle of land acquisition after approval to such acquisition by another Department of the Government, in substance this change of procedure may not lead to any loss to the petitioner-institution or loss to the teaching staff of the University who have successfully bid at the auction. If proper principles are borne in mind, when compensation is fixed at the time of passing the award the institution which the petitioner represents may not stand much to lose. So far as the members of the University staff who have purchased at the auction are concerned they also may not stand to lose because they could occupy the quarters as members of the University staff as long as they are members of the staff.

With these observations the writ petition is dismissed. No order as to costs.

V.K *Petition dismissed.*

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1 A.I R 1925 Bom 538. 2. (1966) 1 S C J. 28: A.I R. 1965 S.C 646.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE K S. VENKATARAMAN

C V. Govindan and another *Petitioners**

v.

A Rajagopal Nadar *Respondent*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10 (3) (a) (1) *and and section* 10 (3) (c)—*Scope and applicability of—Landlord in occupation of a portion of building for non-residential purposes, other portions being in occupation of tenants—Application for eviction against tenants for owner's occupation for his residence—Whether section* 10 (3) (a) (1) *or* 10 (3) (c) *applies*

Held, the application of the landlord will fall under section 10 (3) (*a*) (1) and not under section 10 (3) (*c*) Both in the definition in section 2 (2) and in sub-clauses (*i*), (*ii*) and (*iii*) of section 10 (3) (*a*) a distinction is made between a residential building and non-residential building, and correspondingly occupation for residential purposes of the residential portion and occupation for purposes of business of the non-residential portion. Under the Act, the non-residential portion of the premises in question where the oil mill is being run will be a building separate from the other portions of the buildings which are occupied for residential purposes and which the landlord intends to occupy for purpose of his residence. In other words, even though the landlord is already occupying a part of the building taking the structure as a whole for non-residential purposes, it cannot be said that merely because of that circumstance section 10 (3) (*c*) is attracted, because the occupation of that non-residential portion is for non-residential purposes, whereas he wants to occupy the other portions for residential purposes. The natural and normal interpretation of section 10 (3) (*c*) is that if a landlord is occupying a part of a residential building for residential purposes and wants additional accommodation for residential purposes in the same building, then section 10 (3) (*c*) will apply But this is not such a case.

Held further, on facts, that, assuming section 10 (3) (*c*) applies, the hardship which may be caused to the tenants by the order of eviction cannot in any sense outweigh the advantage to the landlord.

Petition under section 25 of Act (XVIII of 1960), praying the High Court to revise the order of the Court of Small Causes (II Judge), Madras, dated 24th February, 1967 and made in House Rent Appeal No 843 of 1966 (House Rent) Case No. 1242 of 1966, Court of Small Causes (VI Judge) at Madras.

Gajapathy for *V. Janakiraman* and *V. Harinath,* for Petitioners

O. Radhakrishnan, W. S. Venkataramanjulu and *E Veerappan,* for Respondent.

The Court delivered the following

JUDGMENT.—This civil revision petition arises out of an application filed by the owner of No 13, Nagappa Mudali Street, Komaleeswaranpet, Madras-2, under section 10 (3) (*a*) (1) of the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960) for eviction of the four tenants therein since the landlord required the building for his own occupation and was not occupying a residential building of his own in the City. The Rent Controller allowed the application. Two of the four tenants did not challenge the order, but two others, C V Govindan and T. Govindaswami (the petitioners before me), took up the matter in appeal. The appeal was dismissed and hence this further revision petition.

The facts concurrently found by the Courts below are these The landlord is not occupying a residential building of his own in the City He is at present occupying No 21, Chinnathambi Naicken Street, Kosapet, Madras-12, about 7 miles away from the house in question in Komaleeswaranpet. The house in Kosapet belongs to

* C.R.P No 926 of 1967. 27th October, 1967.

the landlords' younger brother Natarajan who got married recently on 28th February 1966. The landlord Rajagopal Nadar has a big family consisting of himself, his second wife, and his four children by his first wife.

The premises in question (No. 13, Nagappa Mudali Street, Komaleeswaranpet) consists of five portions in all. In one portion an oil mill of the landlord Rajagopal Nadar is being run In the four other portions, the four tenants whose eviction was sought were living each separately The landlord required the four portions for residence of himself and the members of his family and also of the three servants working in the oil mill It is true that the landlord owns another building in No. 24/25, Venkatesa Naicken Street, Kosapet But it is in the occupation of some 7 tenants and it will not at all be convenient for the landlord to occupy that house or any portion thereof In particular, that would not solve the landlord's problem of looking after the oil mills because Kosapet is 7 miles from Komalleeswaranpet.

I see no reason to interfere with these findings of fact in revision. The point of land which Sri Gajapathy, learned Counsel for the revision petitioners, urges before me is that the application of the landlord will not fall under section 10 (3) (*a*) (i), but will really fall under section 10 (3) (*c*) and in such a case another criterion has to be satisfied by the landlord before he can evict the tenants, namely, if the hardship which could be caused to the tenants by eviction will outweigh the advantage to the landlord, under the First Proviso to section 10 (3) (*e*) the application will have to be rejected. Learned Counsel submits that the Courts below have not discussed this aspect of the matter

To deal with the point it is necessary to quote certain portions of the Act.

" 10 (3) (*a*). A landlord may, subject to the provisions of clause (*d*), apply to the Controller for an order directing the tenant to put the landlord in possession of the building—

(i) in case it is a residential building, if the landlord requires it for his own occupation or for the occupation of his son and if he or his son is not occupying a residential building of his own in the City, town or village concerned ;

(ii) in case it is a non-residential building which is used for the purpose of keeping a vehicle or adopted for such use, if the landlord requires it for his own use or for the use of his son and if he or his son is not occupying any such building in the City, town or village concerned which is his own ;

(iii) in case it is any other non-residential building, if the landlord or his son is not occupying for purposes of a business which he or his son is carrying on, a non-residential building in the city, town or village concerned which is his own :

" 10 (3) (*c*). A landlord who is occupying only a part of a building, whether residential or non-residential, may notwithstanding anything contained in clause (*a*), apply to the Controller for an order directing any tenant occupying the whole or any portion of the remaining part of the building to put the landlord in possession thereof, if he requires additional accommodation for residential purposes or for purposes of a business which he is carrying on as the case may be

10 (3) (*e*) The Controller shall, if he is satisfied that the claim of the landlord is *bona fide*, make an order directing the tenant to put the landlord in possession of the building on such date as may be specified by the Controller and if the Controller is not so satisfied he shall make an order rejecting the application.

Provided that, in the case of an application under clause (*c*), the Controller shall reject the application if he is satisfied that the hardship which may be caused to the tenant by granting it will outweigh the advantage to the landlord :

* * * *

2. (2) In this Act, unless the conext otherwise requires, "building" means any building or hut or part of a building or hut, let or to be let separately for residential or non-residential purposes . ... "

It seems to me that on the facts of this case, the application of the landlord will fall under section 10 (3) (*a*) (i) and not under section 10 (3) (*c*). It may be noted that both in the definition in section 2 (2) and in sub-clause (*i*), (*ii*) and (*iii*) of section 10 (3) (*a*) a distinction is made between a residential building and a non-residential building a d correspondingly occupation for residential purposes of the residential portion and occupation for purposes of business of the non-residential portions. It will seem, therefore, that under the Act, the non-residential portion of the premises in question where the oil mill is being run—and it is not disputed before me by the learned Counsel for the petitioners that it cannot be used for residential purposes as it stands, will be a building separate from the other portions of the busilding which are occupied for residential purposes and which the landlord intends to occupy for purposes of his residence In other words, even though the landlord is already occupying a part of the building taking the structure as a whole for non-residential purposes, it cannot be said that merely because of that circumstances section 10 (3) (*c*) is attracted, because the occupation of that non-residential portion is for non-residential purposes, whereas he wants to occupy the other portions for residential purposes. The natural and normal interpretation of section 10 (3) (*c*) is that if a landlord is occupying a part of a residential building for residential purposes and wants additional accommodation for residential purposes in the same building, then section 10 (3) (*c*) will apply. But this is not such a case I put forth this interpretation and invited learned Counsel on the two sides to cite any decision which would confirm or run counter to this view. But they have stated that there are no decisions either way. It seems to me that the decision of Jagadisan and Srinivasan, JJ. in *Jaffar* v. *Palaniappa*[1], is not inconsistent with the view which I am expressing. In that case the landlord was occupying a part of the building for residential purposes and wanted additional accommodation of a part of the remaining portion of the premises which part was occupied as a shop by the tenant The landlord invoked section 7 (3) of the Act of 1949, corresponding to section 10 (3) (*c*) of the Act of 1960. The contention of the tenant was that section 7 (3) (*c*) of the Act of 1949 would not apply and this was put on a two-fold aspect, first, that, having regard to the definition of building in section 2 (same as the present Act for our purpose) the portion already in the occupation of the landlord must be considered as a separate building by itself, and secondly, that similarly the portion sought to be recovered must also be considered as a separate building. In effect, therefore, the tenant's contention was that the application would fall under section 7 (3) (*a*) (i) of the Act of 1949 corresponding to section 10 (3)(*a*)(i) of the Act of 1960, and, therefore, not maintainable. This contention was repelled on the reasoning that the definition of building as including part of a building was only a statutory fiction created for the benefit of the tenant, but would not make the part of the building cease to be a part of the building for construing section 7 (3) (*c*) and that, where the landlord in occupation of a part wants additional occupation of a portion or whole of the remaining part, the terms of section 7 (3) (*c*) will clearly apply The question which I am now considering did not fall for decision in that case.

Assuming, however, for the sake of argument that the decision will apply, it will only mean this, that the landlord here is already occupying a part of the building No 13, Nagappa Mudali Street, Komaleeswaranpet by running an oil mill there and eventhough he wants to occupy the other portions of the building for residential purposes, the case will fall under section 10 (3) (*c*) of the Act, . But even on this footing it seems to me that there is no reason for interference with the order of eviction I invited the learned Counsel for the petitioners to take me through the evidence to convince me that the hardship which may be caused to the tenants by the order of eviction will outweigh the advantage to the landlord Learned Counsel says that there is no evidence on this point. It does not appear at all that the tenants were precluded from giving evidence on that point Further, the circumstances of the case speak for themselves, namely, here is a landlord who is not occupying a

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1. (1964) 1 M.L.J. 112. I.L.R. (1964) 1 Mad. 34.

residential building of his own and wants this residential portion badly for his large family. The hardship which may be caused to the tenants by the order of eviction cannot in any sense outweigh the advantage to the landlord in such a case.

In the result the petition is dismissed with costs The tenants will be given two months' time from now to vacate provided they pay up the arrears of rent, if any, up-to-date within a week from now That may be determined by the executing Court.

S.V.J. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction).

PRESENT —MR. M. ANANTANARAYANAN, *Chief Justice* AND MR JUSTICE M. NATESAN

M/s. Presidency Talkies Private Limited, Proprietor of Paragon Talkies .. *Appellant**

v.

The Presiding Officer, Labour Court, Madras and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), *section* 33 (2) (b)—*Interpretation—Meaning of "paid"—Management offering to pay, but employee refusing to accept it—If in compliance with section* 33 (2) (b)

The two points for determination are (1) What is the legal interpretation of the word 'paid' as occurring in section 33 (2) of the Industrial Disputes Act, and (2) (2) what is the precise point of time at which or prior to which such an offer should have been made for the offer to be considered as compliance with the law.

Held that, the employer, when he takes the action under section 33 (2) by dismissing or discharging an employee, should immediately pay him, or offer to pay him, wages for one month and also make an application to the tribunal for approval at the same time Therefore, it is clear that, whereas in this case, the employee spurns the offer, the management would have fulfilled its obligation by making the offer ; the management need not secure, as indeed it cannot secure, the acceptance of the offer by the employee, before filing the application.

Held also that, the offer should have been made simultaneously with the application or prior thereto, depending on the facts of each case In the present case, even the very first application claimed that the pay was offred to the workman, or had been 'paid' in that sense And this claim was not even refuted by the workman In the second application, treating that as the effective one, the same averments are to be found, and there was no denial or counter statement

Therefore there was proper compliance with section 33 (2) (*b*) of the Act

Appeal under clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Veerswami dated 1st July, 1964 and made in the exercise of the Special Original Jurisdiction of the High Court in W. P. No. 815 of 1962 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records relating to the order of the first respondent in Complaint No. 11 of 1961 and Petition No 18 of 1961 dated 8th May, 1962 and quash the said order made therein

T. V. Balakrishnan, C V. Mahalingam and *T. S Viswanatha Rao,* for Appellants.

V. Krishnan, P Veeraraghavan and *B Kalyanasundaram,* for Respondents

The Judgment of the Court was delivered by

Anantanarayanan, C J.—This appeal has been instituted by Messrs Presidency Talkies (Private) Ltd , Proprietors of Paragon Talkies, Madras, from the judgment

*W.A No. 249 of 1964. 4th December, 1967.

of Veeraswami, J., in W.P. No. 815 of 1962, declining to issue a writ of *certiorari* quashing the award of the Labour Court in respect of one R Venugopal, an employee of the petitioner-firm and the main respondent

The facts are quite simple, and may be briefly referred to at the outset The employee (R Venugopal) was suspended on 19th June, 1961, upon the main charge that he exhibited an advertisement slide without the permission of the management It will be easily appreciated that advertisement slides are exhibited during a performance as a consequence of contracts between the advertising firms and the management; the management derives a revenue from such exhibition of slides, which may be considerable Hence, if a slide, the exhibition of which is not authorised by the management, is deliberately exhibited by an employee during a performance, the concerned firm obtains the benefit of the advertisement, to the definite loss of the management Such behaviour on the part of an employee, if deliberate and not otherwise justified, may certainly amount to misconduct, and even misconduct of a grave character.

An enquiry was held by the management on 17th July, 1961 and on 25th July, 1961, the management drew up minutes referring to the evidence, holding that the charge was proved, and purporting to record the dismissal of the employee. As this occurred during the pendency of proceedings in respect of an industrial dispute, the management sought the sanction of the Labour Court for approval of the contemplated action of dismissal, under section 33 (2) (*b*) of the Industril Disputes Act. Independently of this, the employee seems to have filed an application under section 33-A, before the Labour Court, complaining that the management had not complied with the requirements of section 33 (2) (*b*), and that the petition of the management was therefore liable to be dismissed. Both these petitions were apparently tried together, and disposed of by a single award or order of the Labour Court, declining to grant the sanction. The writ petition was filed, as we stated earlier, to quash this award.

The learned Judge (Veeraswami, J) has dealt only with one ground of alleged non-compliance on the part of the management, under section 33 (2) (*b*) That ground was that the worker was not paid his wages for one month, as required by the Proviso to section 33 (2) (*b*), before the management purported to record his dismissal. The learned Judge went into this question, and negatived the argument of learned Counsel for the management that an offer of a one month's wages, where this offer is refused by the worker, would be adequate compliance with the law The learned Judge appears to have thought that, in any event, there was no plea that one month's wages were offered on or prior to the date of dismissal The learned Judge observed that there was a plea that one month's wages were offered, and that the offer was refused

On the facts, we are afraid that there has been more than one misconception or mis-statement of fact before the learned Judge, as the facts have been referred to and discussed in the judgment We have gone into this matter carefully, and there can be no doubt whatever that the management did allege, and alleged repeatedly, that there was an offer of one month's wages to the concerned employee (respondent) prior to the filing of the application, which was not accepted In view of the vagueness, on this aspect, in the judgment of the learned Judge, we think that it would be desirable to refer to the actual record. On 25th July, 1961 the management filed its first application before the Labour Court under section 33 (2) (*b*) of the Act. This is paragraph 1 (*a*) of that petition—

> "The workman has been dismissed for the reasons stated below, under the provisions of section 33 (2) (*b*) of the Industrial Disputes Act, 1947, and has been paid one month's wages".

A counter statement to this was filed by the workman, which is also on record. It is matter both of record and admission that, in this counter statement, this averment has not been refuted in any manner Consequent upon the return of this petition for

technical reason, the management filed a second petition before the Labour Court under section 33 (2) (*b*), namely, I D. No. 31 of 1961 In this it is stated that " he (the workman) has been paid one month's wages according to the proviso thereto, but the said workman has refused to receive the same "

There are two points here, which can be very briefly clarified The first point is, what is the legal interpretation of the word ' paid ' as occurring in section 33 (2) (*b*) Proviso ? Does it mean not merely that the management should make the offer of one month's wages, but also that the workman should necessarily accept the wages, a matter depending entirely on his violition, before the management could act further ? The answer to this is to be found in *Straw Board Manufacturing Co., Ltd.* v. *Govind*[1], wherein their Lordships observed.

> " that the employer when he takes the action under section 33 (2) by dismissing or discharging an employee, should immediately pay him, or offer to pay him, wages for one month and also make an application to the tribunal for approval at the same time ".

Therefore, it is clear that, where as in this case, the employee spurns the offer, the management would have fulfilled its obligation by making the offer ; the management need not secure, as indeed it cannot secure, the acceptance of the offer by the employee, before filing the application.

The second point is, what is the precise point of time at which, or prior to which such an offer should have been made, for the offer to be considered as compliance with the law ? This, again, is answered by the same observations of the Supreme Court that we have just referred to As will be clear from those remarks, the offer should have been made simultaneously with the application or prior thereto, depening on the facts of each case. In the present case, even the very first application claimed that the pay was offered to the workman, or had been ' paid ' in that sense. And this claim was not even refuted by the workman In the second application, treating that as the effective one, the same averments are to be found, and there was no denial or counter statement.

Under these circumstances, we are afraid that the learned Judge (Veeraswami, J) was under a misapprehension when he thought that there was non-compliance with section 33 (2) (*b*) of the Act, on the part of the employer As regards the offer of one month's wages to the employee, there has been non-compliance whatever, and the employee did not even controvert the allegation of the employer made at the material point of time that, at that time or prior to it, a month's wages had been offered to the employee, and had been rejected by the employee It is clear that the employer-organisation has no means of compelling an unwilling employee to accept one month's wages If indeed that were to be the law, every application under section 33 (2) (*b*) could be defeated, by the simple device on the part of the workman of not taking the offered wages

It follows that the only ground on which the writ petition was dismissed, cannot be sustained by us But, before the Labour Court, there was another ground mooted though it was not dealt with by the learned Judge. In referring to this ground, we might briefly cite the observations of their Lordships of the Supreme Court in *Lord Krishna Textile Mills* v. *Its Workmen*[2]. As the Supreme Court pointed out, the appropriate authority dealing with an application under section 33 (2) (*b*) cannot examine the facts, as an appellate Court might do. It is only if the authority is satisfied that the finding recorded at the domestic enquiry is perverse, in the sense that it is not justified by any legal evidence whatever, that the authority may be entitled to decline approval Their Lordships have stressed the difference between a finding not supported by legal evidence, which is sometimes loosely called the ' No evidence' Rule of Judicial Review and a finding supported by evidence, which an authority exercising jurisdiction under the Industrial Law, may not itself consider adequate or satisfactory.

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1 A I R 1962 S C 1500 (1961) 2 S C J 300 A I R 1961 S C 860
2 (1961) 1 L L J 211. (1961) 3 S C R. 204

In the present case, the complaint appears to be that the evidence about the misconduct was forthcoming only from witnesses referred to by the employee himself. We find that even this complaint, strictly speaking, may not be justified. For, though the record refers to the Manager and the Operator as witnesses referred to by the employee, they appear to have been examined-in-chief for the employer organisation, and cross-examined by the employee. However, since we are not in a position to judge whether there was legal evidence in support of the charge or otherwise, this matter not having been dealt with at all by the learned Judge (Veeraswami, J.,) we allow the appeal to the extent of setting aside the judgment of the learned Judge, and issuing a writ of *certiorari* quashing the award. This displacement of the award now releases the proceeding for further action by the Labour Court, if the employee desires to ventilate his grievance further, and the management also wants the approval of the Labour Court now under section 33 (2) (*b*). No order as to costs.

V.M.K. *Writ appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE N. KRISHNASWAMI REDDY.

C. Bhaktavatsalam .. *Petitioner**

v.

V. Govindarajulu .. *Respondent.*

Criminal Procedure Code (V of 1898), section 190—Commissioner of Police passing final orders referring the complaint given to the police as mistake of fact—If operate to bar a complaint before a Magistrate having jurisdiction—If an abuse of process—Practice.

The Commissioner of Police who passed the final orders referring the complaint (of the respondent) given to the police as mistake of fact will not be a bar for a complaint before a Magistrate having jurisdiction. It is true that under section 7 of the Madras City Police Act, it is provided that the Commissioner shall by virtue of his office be a Presidency Magistrate, but he shall exercise his powers as Magistrate subject to such orders as may from time to time be issued by the State Government. The G.O No. 1271 (Judicial) dated 13th August, 1968, makes it clear that the Commissioner of Police in Madras is prohibited from exercising the power of taking cognizance of offences under section 190, Criminal Procedure Code. An order passed by the Commissioner of Police under section 173, Criminal Procedure Code, cannot under any circumstances be a bar for a complaint by a party before a Magistrate who has jurisdiction to take cognizance of the complaint under section 190, Criminal Procedure Code. As a matter of fact, it is the practice when the police give a notice to the party referring the case, such party is requested to file a complaint before a Magistrate, if so advised. There being no prior complaint before the Magistrate which resulted in a dismissal under section 203, Criminal Procedure Code, the complaint filed by the respondent cannot be said to be an abuse of process.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Sixth Presidency Magistrate of the Court of the Presidency Magistrates, Saidapet, Madras, dated 21st July, 1967 and made in M P. No. 60 of 1967 in C C. No 2270 of 1967.

V. Ganapathy Subramania Iyer, for Petitioner.

V. Gopinath, for Respondent.

Calvin Jacob, for Public Prosecutor, for State

The Court made the following

ORDER —This petition has been filed by the first accused in C C. No. 2270 of 1967 against the order of the Sixth Presidency Magistrate overruling certain preli-

*Cr. R. C No. 893 of 1967 (Cr. R.P. No. 880 of 1967) 5th March, 1968.

minary objections raised by him The facts of the case relevant for the purpose of deciding the points raised in this petition are briefly these .

The respondent V. Govindarajulu, a retired Deputy Administrator-General and Official Trustee, Madras, filed a private complaint against the revision petitioner and two others alleging that they had committed the offence of criminal breach of trust and falsification of accounts in respect of certain trust properties of Saidapet Annadhana Samajam which is a public charitable society, of which the petitioner was the Secretary and the other two accused were the President and Treasurer, respectively The Sixth Presidency Magistrate took the case on file. The revision petitioner filed a petition before the learned Magistrate alleging firstly, that the respondent was not a member of the Annadhana Samajam and as it is not shown that he was interested in the Samajam or the school run by it, he is incompetent to file the complaint ; secondly, that the respondent filed a petition before the Deputy Commissioner of Crimes in respect of the same matter and the said complaint was referred as a mistake of fact and that subsequently he appealed to the Commissioner and the same was also dismissed and in those circumstances, the present complaint was not maintainable and its entertainment was barred ; thirdly, that the complaint did not disclose any offence and so it was liable to be dismissed ; and lastly, that at the instance of the respondent, a civil suit was filed in respect of the same facts alleged against the petitioner and the other accused and that the complaint filed while the suit was pending, without the sanction of the civil Court was not maintainable.

It has to be noted that after the Commissioner of Police disposed of the matter, the revision petitioner filed a complaint under section 211, Indian Penal Code, against the respondent and that was dismissed Subsequently the respondent filed the present complaint and it appears, a revision against that order is pending.

Learned Sixth Presidency Magistrate negatived all the contentions raised by the petitioner before him and in my opinion, rightly

The learned Counsel appearing for the petitioner pressed before me the second point raised before the Magistrate, namely that the present complaint is barred as the complaint given by the respondent in respect of the same facts before the police was referred as mistake of fact and the Commissioner of Police on appeal by the respondent, refused to interfere with the order of the Police. He further contended that the present complaint is an abuse of process of Court as he had already exhausted his remedy before the police There is absolutely no force in this contention. The learned Magistrate took cognizance of the case under section 190 (1) (*a*) of the Criminal Procedure Code Under section 190 (1) (*a*), Criminal Procedure Code, a Magistrate having jurisdiction, may take cognizance of any offece upon receiving a complaint of facts which constitute such offence.

" Complaint " is defined under section 4 (1) (*h*) of the Criminal Procedure Code as the allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person whether known or unknown, has committed an offence, but it does not include the report of a Police Officer.

Under section 200, Criminal Procedure Code, a Magistrate taking cognizance of an offence on complaint shall examine the complainant and the witnesses present, if any, upon oath. Under section 202, Criminal Procedure Code, a Magistrate, on receipt of a complaint of an offence may either inquire into the case himself or, if he is a Magistrate other than a Magistrate of the Third Class, direct an enquiry or investigation to be made by any Magistrate subordinate to him, or by a Police Officer, for the purpose of ascertaining the truth or falsehood of the complaint Under section 203, Criminal Procedure Code, the Magistrate before whom a complaint is made, may dismiss the complaint, if, after considering the statement on oath (if any) of the complainant and the witnesses and the result of the investigation or inquiry (if any) under section 202, there is in his judgment no sufficient ground for proceeding. These provisions make it clear that when a complaint is filed before a Magistrate,

he may take cognizance of the case on examining the complainant on oath or he may enquire himself or direct any other Police Officer for the purpose of ascertaining the truth of the case and if he is satisfied from the examination of the complainant on oath and the report of the Police Officer that there are no sufficient grounds for proceeding with the case he may dismiss it. What was preferred by the respondent before the Sixth Presidency Magistrate was a complaint within the meaning of section 4 (1) (*h*) of the Criminal Procedure Code The Magistrate took cognizance of the case under section 190 (1) (*a*), Criminal Procedure Code. The learned Magistrate is fully competent to take cognizance on a complaint of a cognizable or a non-cognizable offence There is no prohibition under the Criminal Procedure Code for a Magistrate taking straightway cognizance of even a cognizable offence on a complaint preferred by the party. If once the Magistrate had exercised his power under section 203, Criminal Procedure Code, and dismissed such a complaint, whether a second complaint would be barred is a matter which will very much depend upon the facts of each case. In the present case, it is not the case of the petitioner that the Magistrate had taken cognizance of the matter already and dismissed it under section 203, Criminal Procedure Code, and that the present complaint was barred But he contends that inasmuch as the information was laid in respect of the same facts covered by the present complaint to the Police Officer and it was referred as a mistake of fact and on appeal, the Commissioner confirmed it, it must be deemed as dismissal of complaint by the Commissioner as he exercised the powers of a Presidency Magistrate in the City of Madras. If as contended by the learned Counsel, the Commissioner of Police exercised the powers of a Presidency Magistrate in respect of cognizance of cases under section 190, Criminal Procedure Code, there may be some force that once in that capacity the Commissioner of Police has dealt with the complaint, that the second complaint may amount at least to abuse of process. But it appears to be clear that the Commissioner of Police has no power to take cognizance of a complaint under section 190, Criminal Procedure Code. Under section 7 of the Madras City Police Act, it is provided that the Commissioner shall by virtue of his office be a Presidency Magistrate, but shall exercise his powers as Magistrate subject to such orders as may from time to time be issued by the State Government. The State Government passed G.O. No. 1271 (Judicial) dated 13th August, 1898, which still seems to be in force is as follows:

> " In exercise of the power conferred upon him by section 7 of the Madras Police Act, 1888 and in supersession of all previous orders on the subject, the Governor-in-Council is pleased to declare that the Commissioner of Police, Madras, shall not, in his capacity as a Presidency Magistrate, exercise the power of taking cognizance of offences under section 190 of the Code of Criminal Procedure, except so far as may be necessary to receive " occurrence reports " under section 157 and to deal with such reports under section 159, and also to receive and dispose of reports submitted under section 173 and to make orders under sub-section (3) of that section."

The above Government Order makes it clear that the Commissioner of Police in Madras is prohibited from exercising the power of taking cognizance of offences under section 190, Criminal Procedure Code. But, of course, under the same Government Order, the Commissioner of Police can receive occurrence reports under section 157, Criminal Procedure Code, and finally, reports under section 173, Criminal Procedure Code, and he can also pass orders under section 173 (3) of the Code An order passed by the Commissioner of Police under section 173, Criminal Procedure Code, cannot under any circumstances be a bar for a complaint to be filed by a party before a Magistrate who has jurisdiction to take cognizance of the complaint under section 190, Criminal Procedure Code Even in a case where the police investigate a cognizable offence in respect of the information received by them and submit a final report under section 173, Criminal Procedure Code, of which the Magistrate having jurisdiction takes cognizance by virtue of section 190 (1) (*b*), Criminal Procedure Code, I do not think there will be a bar for the Magistrate taking cognizance of a complaint filed by a party in respect of the same facts

under section 190 (1) (*a*), Criminal Procedure Code, and proceed with the enquiry or the trial, as the case may be, or of both. The investigation by the police of a cognizable offence has nothing to do with the Magistrate taking cognizance of the same matter on a complaint by a party. So, I am of the view that the Commissioner of Police who passed the final orders referring the complaint given to the police as mistake of fact will not be a bar for a complaint before a Magistrate having jurisdiction. As a matter of fact, it is the practice that when the police give a notice to the party referring the case, such party is requested to file complaint before a Magistrate, if so advised.

The learned Counsel for the petitioner relied upon two decisions of the Supreme Court, namely (1) *Gopal Das* v. *State of Assam*[1] and *Pramatha Nath* v. *Saroj Ranjan*[2]. In the earlier decision, the Supreme Court has stated that a complaint disclosing cognizable offences may well justify a Magistrate in sending the complaint under section 156 (3) to the police for investigation and if he does so then he would have to proceed in the manner provided by Chapter XVI of the Criminal Procedure Code. The Supreme Court pointed out only the discretion given to a Magistrate to direct the Police Officer to investigate the case under section 156 (3). But this does not mean that the Magistrate has no power to take cognizance of the case under section 190 (1) (*a*) following the procedure laid down in sections 200, 202 and 203 of the Code. In has been made clear by the Supreme Court that the Magistrate should follow the procedure in taking cognizance of complaints even in cases where the Magistrate had directed the police to investigate under section 156 (3). In the second case, the Supreme Court has stated as follows :

> "An order of dismissal under section 203, Criminal Procedure Code, is no bar to the entertainment of a second complaint on the same facts but it will be entertained only in exceptional circumstances, *e.g*, where the previous order was passed on an incomplete record or on a misunderstanding of the nature of the complaint or it was manifestly absurd, unjust or foolish or where new facts which could not with reasonable diligence, have been brought on the record in the previous proceedings have been adduced. It cannot be said to be in the interests of justice that after a decision has been given against the complainant upon a full consideration of his case, he or any other person should be given another opportunity to have his complaint enquired into."

This decision will not at all apply to the facts of this case because there was no prior complaint before a Magistrate which ended in a dismissal under section 203, Criminal Procedure Code. Similarly, another decision in *Kumaraiah* v. *Chinna Naicker*[3], is of no help to the petitioner. That was also a case where a complaint filed by the party was dismissed under section 203, Criminal Procedure Code, after the investigation by the police under section 202 of the Code and after such dismissal, a second complaint was filed. It was held that though a second complaint may not be barred for its entertainment on the facts of the case, it might be an abuse of process. The learned Counsel for the petitioner relied upon another decision in *A. K. Roy* v. *State of W.B.*[4]. Even this decision is of no use in relation to the facts of this case. What is stated in that decision is that when the police upon investigation has submitted a final report under section 173, Criminal Procedure Code, a Magistrate cannot direct the police to submit a charge-sheet; but he can take cognizance on the statement of facts contained in the final report, if those facts constitute an offence. I am not able to see as to how this observation is relevant for this case.

I am, therefore, of the view that the complaint filed by the respondent is neither an abuse of process nor barred because of the prior investigation by the police.

V.M.K. ——— *Revision case dismissed.*

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1. A I R 1961 S C 987.
2. (1962) 2 S C R. (Supp) 297 : A.I.R. 1962 S C 876.
3. 1945 M.W.N (Crl) 144
4. A.I R. 1962 Cal. 135.

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. SRINIVASAN, MR. JUSTICE P. RAMAKRISHNAN AND MR. JUSTICE K. S. RAMAMURTI.

P. Sivasankarasubramania Pillai and others .. *Petitioners**

v.

The Revenue Divisional Officer, Tuticorin and others .. *Respondents.*

Madras Revenue Recovery Act (II of 1864), *section* 38—*Madras Subordinate Collectors and Revenue Malversation (Amendment) Regulation (VII of* 1828), *section* 3 (3)—*Respective scope—Revenue sale confirmed by Deputy Collector—Jurisdiction of District Revenue Officer to set aside the sale under section* 3 (3) *of Regulation (VII of* 1828) *read with section* 38 (3) *of the Revenue Recovery Act—Scope and ambit of revisional powers of Collector under section* 3 (3) *of Regulation (VII of* 1828)—*Considerations to be taken into account for exercise of discretion.*

Madras Hereditary Village Offices Act (III of 1895), *sections* 7 *and* 23—*Madras Subordinate Collectors and Revenue Malversation (Amendment) Regulation (VII of* 1828), *section* 3 (3)—*Order of suspension passed against village headman by Revenue Divisional Officer under section* 7 *of Madras Act (III of* 1895)—*Village headman preferring no appeal against order—District Revenue Officer if can* suo motu, *revise the order under section* 3 (3) *of Regulation (VII of* 1828)—*Existence of right of appeal under section* 23 *of Madras Act (III of* 1895)—*If extinguishes revisional powers under section* 3 (3) *of Regulation VII of* 1828.

Even after the confirmation of a revenue sale by the Deputy Collector, the District Revenue Officer has jurisdiction to set aside the sale under the powers of superintendence, control and revision given to a Collector under section 3 (3) of the Madras Subordinate Collectors and Revenue Malversation (Amendment) Regulation (VII of 1828) read with section 38 (3) of the Madras Revenue Recovery Act.

[*Held*, there was no conflict between the two Full Bench decisions of *Chittayya* v. *Secretary of State for India*, (1931) 62 M.L.J. 592 : I.L.R. 55 Mad. 453 and *Nagarathnammal* v. *Ibrahim Sahib*, I.L.R. (1955) Mad. 460: (1955) 2 M.L.J. 49, and that they did not require reconsideration by a larger Bench].

But while exercising the revisional powers under section 3 (3) of the Madras Regulation (VII of 1828) it must be borne in mind that even though the power of superintendence, control and revision reserved to the Collector under the section is in very wide terms and the proceedings of the Subordinate or Assistant Collectors are subject to revision *in the fullest manner*, a restriction has to be imposed as necessarily flowing from the provisions of the particular statutes which the Subordinate or Assistant Collector enforces or administers. The wide language employed in section 3 (3) of the Regulation does not mean that the Collector can pass any order which the Subordinate or Assistant Collector could not himself have passed under section 38 of the Revenue Recovery Act. The power of revision would extend only to the limit of enabling the District Collector to substitute his own order which he would have passed within the framework of the Revenue Recovery Act and within the strict limits and subject to the provisions of section 38 (1) and (3) of the Revenue Recovery Act His power does not extend to collateral matters or objects alien to the enactment in question.

Relying upon the wide language of section 3 (3) of the Regulation the District Collector cannot exercise an undefined, unrestricted or an unlimited plenary power outside the provisions of the Revenue Recovery Act The correct legal position is that whenever the legality or the correctness of the order of the District Collector passed in revision under section 3 of the Regulation is questioned,

it must be shown that the Collector acting within the scope of his authority could have himself passed the order in question, if he had acted as the original authority. His decision should conform to the limitations and restrictions, whatever they may be, express or arising by necessary implication in the context of section 38 of the Revenue Recovery Act.

There is no time-limit within which the District Collector should or could exercise his power of revision under section 3 (3) of Regulation VII of 1828. If confirmation of the sale by the Sub or Assistant Collector is fixed as the time-limit, the power of revision will become useless and illusory in a vast majority of cases. Far from the confirmation of the sale by the Sub-Collector operating as a time limit, the power of the District Collector to set aside a sale must be recognised at any stage and only then the main object underlying Regulation VII of 1828 would be achieved. Any other view would result in strange and absurd results virtually making the Subordinate Collector the head of the revenue administration of the district.

The power reserved under the proviso to section 38 (3) of the Revenue Recovery Act to set aside a revenue sale is in the discretion of the authority. It would not be correct to read into it any time-limit beyond which this power cannot be exercised, especially when in the same section a time-limit of one month is fixed in the case of an application and no such time-limit is mentioned in the proviso. Under this provision even the Sub-Collector will have jurisdiction to set aside the sale even after its confirmation.

Even otherwise, *i.e.*, even if it should be held that the Sub-Collector will have no power to set aside the sale under the proviso to section 38 (3) of the Revenue Recovery Act once he has confirmed it, if the revenue sale is such that it ought not to have been confirmed the District Collector is entitled, under the powers of revision under section 3 (3) of the Regulation (VII of 1828), to set aside the revenue sale for the reasons in the proviso to section 38 (3) of the Revenue Recovery Act

Thus, so far as the District Collector is concerned, there is no limitation or restriction on his powers to revise the orders of the Subordinate Collector except that it should be for effectuating the purposes of the Revenue Recovery Act. Long lapse of time, consequent appreciation in prices, negligence and laches of the party aggrieved, the conduct of the party giving rise to equitable estoppel, intervention of rights of third parties, who have become *bona fide* transferees for value and who have invested large sums of money by way of reclamation and improvement of lands or putting up buildings, are all circumstances which will be taken into account by the District Collector when exercising his powers of revision. The undoubted authority and jurisdiction should not be mixed up with the discretion involved in the exercise of the same The wider the power the greater is the circumspection and discretion required in exercising it.

Similarly the District Revenue Officer has under section 3 (3) of the Madras Regulation (VII of 1828) undoubted jurisdiction to revise, *suo motu*, an order of suspension passed by the Revenue Divisional Officer in the course of disciplinary proceedings under the Madras Hereditary Village Offices Act (III of 1895) The argument that if in respect of the order no appeal is preferred by the aggrieved person under section 23 of Madras Act (III of 1895), that order becomes final and the District Revenue Officer has no revisional jurisdiction under Regulation (VII of 1828), is untenable.

It is not possible to hold that the machinery for the right of an appeal in section 23 of the Madras Act (III of 1895) will have the effect of extinguishing the revisional power of the District Collector under Regulation (VII of 1828). The provision for an appeal is for an entirely different purpose, namely, a statutory right of appeal to the aggrieved party. The power of revision and superintendence is a different power altogether and that is vested with the discretion of the Collector with a view to ensure and maintain the efficiency, purity, morale and the disci-

pline amongst the subordinate revenue officials. Both the powers can co-exist and there is nothing so inherently incompatible in the two powers as to make one hold that the existence of the one necessarily means the supersession of the other. The conferment of a right of appeal to the aggrieved party to the higher authority, at the same time reserving a *suo motu* power of revision in the higher authority is a quite known and familiar conception. Section 23 of the Madras Act III of 1895 cannot be so interpreted as to have the effect of extinguishing the power of revision of the District Collector under section 3 (3) of the Madras Regulation VII of 1829

Case law discussed.

The Board of Revenue, however, has no power of revision in respect of the order passed by the District Revenue Officer under the Madras Regulation VII of 1828.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records of the Board of Revenue (the third respondent herein) relating to the petitioners' appeal, dated 2nd August, 1962, against the order of the District Revenue Officer, Tirunelveli, dated 29th June, 1962, and to quash the Board's final order made in its proceedings B.P. Rt. No 1019 (A), dated 4th March, 1963

V. K. Thiruvenkatachari for *R. G Rajan, M M. Ismail* for *P. Ramaswami, S. Mohan* and *A. R. Ramanathan*, for Petitioners

The Government Pleader (*G Ramanujam*) and *V Vedantachari*, for Respondents.

The Judgment of the Court was delivered by

Ramamurti, J—The above cases have been directed by the Learned Chief Justice to be posted before this Full Bench as Kailasam, J., and Venkatadri, J. (sitting singly) before whom these cases came, took the view that there is a conflict between two Full Bench decisions of this Court *Chittayya* v. *Secretary of State for India*[1], and *Nagarathnammal* v. *Ibrahim Sahib*[2].

Writ Petition No. 1027 of 1963, arises out of proceedings, under the Madras Hereditary Village Offices Act (III of 1895). The question raised is whether the District Revenue Officer has jurisdiction to modify the order passed by the Revenue Divisional Officer in the course of the disciplinary proceedings against a village headman. Writ Petition Nos. 1225 of 1963 and 424 of 1964, arise out of proceedings under the Madras Revenue Recovery Act (II of 1864) and the question raised is whether, after the confirmation of a revenue sale by the Deputy Collector, the District Revenue Officer has jurisdiction to set it aside under Regulation VII of 1828 (The Madras Subordinate Collectors and Revenue Malversation) (Amendment) Regulation, 1828 read with section 38 of the Madras Revenue Recovery Act. Elaborate arguments were advanced before us about the precise scope of the decision in both the Full Bench cases, as to the relative jurisdiction and powers of the Sub-Divisional Officer, the District Revenue Officer as well as the District Collector, in regard to proceedings under the enactments aforesaid. After hearing arguments of learned Counsel appearing for all parties, it was noticed that there is really no conflict between the two Full Bench decisions of this Court. Even so, arguments were allowed to be proceeded with as Counsel for the petitioners wanted to convince us that the two Full Bench decisions require reconsideration on the ground that certain crucial and relevant aspects were not given adequate consideration in the two decisions Even at the threshold we may state we are not persuaded that the matter requires a fresh consideration by a larger Bench With respect, we are of the opinion that the view expressed in the two Full Bench decisions is correct.

Writ Petition No 1027 *of* 1963—The petitioner herein is the village headman of Manjeerkayal and Palayakayal villages of Srivaikuntam taluk, Tinne-

1. (1931) I L R 55 Mad 433 : 62 MLJ 92.

2. I L R. (1955) Mad 460. (1955) 2 M L J. 49

velly district. By his proceedings, dated 8th December, 1961, the Revenue Divisional Officer, Tuticorin, framed two charges against the village headman; (*i*) that he did not issue printed receipts as required by the rules for the amounts collected from the pattadars during the years 1957-1960; and (*ii*) he had collected a sum of Rs. 1,298-62 and temporarily misappropriated it for a period of six months, and after an enquiry and after hearing the explanations of the village headman, the Revenue Divisional Officer passed an order on 11th January, 1962, suspending the village headman for a period of one year reckoning from 6th May, 1962. The village headman did not file an appeal against this order of the Revenue Divisional Officer.

But the District Revenue Officer took up the matter *suo motu*. He was of the view that the case was one of proved misappropriation and that the punishment of suspension for one year was inadequate. He, therefore, issued a notice to the village headman to appear before him on 27th April, 1962, and to show cause why the punishment should not be enhanced to one of removal from service. After hearing the explanations of the village headman, the District Revenue Officer of Tinnevelly passed an order, dated 29th June, 1962, by which he directed that the village headman should be removed from service. Thereupon the petitioner herein, the village headman, filed a petition before the Board of Revenue objecting that the District Revenue Officer had no power, *suo motu*, to revise the order of the Revenue Divisional Officer, especially when the village headman had not preferred an appeal to the District Revenue Officer against the order of suspension and the period of suspension of one year had already expired. The Board of Revenue by its order, dated 4th March, 1963, set aside the order of the District Revenue Officer and remanded the matter for fresh enquiry after furnishing full details of the charges, the dates of collection, the date of remittances, etc, thus giving the village headman concerned an adequate opportunity to make a proper defence in respect of the charges. The Board was of the view that the proceedings were irregular inasmuch as the charges were not precise, and did not contain the requisite details. At the same time, the Board over-ruled the objection raised by the village headman as to the *suo motu* power of revision of the District Revenue Officer. The Board held that the District Revenue Officer had undoubted jurisdiction to revise the order of the Revenue Divisional Officer by virtue of section 3 of Regulation VII of 1828.

This Writ Petition has been filed to quash the proceedings of the Board of Revenue and the District Revenue Officer, the main complaint being that the order of the Revenue Divisional Officer had become final, the petitioner not having preferred any appeal and having suffered the punishment of suspension for a period of one year.

Writ Petition No. 1225 *of* 1963.—In a revenue sale held on 20th March, 1958, under the provisions of the Madras Revenue Recovery Act the land bearing S. No. 276 of an extent of 14 36 acres situated in the village of Nedambaram, Tiruttani taluk, Chingleput district, was purchased by the petitioner in this writ petition for a sum of Rs. 65 This sale was confirmed by the Deputy Collector-Manager, Tiruttani, on 30th March, 1960, and a certificate of sale was also issued On 22nd December, 1961, one Munikanniah, the second respondent in this petition, filed a petition before the District Revenue Officer, Chingleput, to set aside the revenue sale on the ground that out of an extent of 14.36 acres comprising the field S. No. 276, land of an extent of 91 cents belonging to Munikanniah and covered by P. Nos. 11 and 18 of Seethapuram Village comprised in the revenue group of Nedambaram was also sold while the arrears due were in respect of P Nos 25 and 2 only. The District Revenue Officer after investigation found that this bit of land, 91 cents, covered by P Nos. 11 and 18 did not belong to the defaulter, Chinna Munuswami and set aside the sale in respect of the entire 14 36 acres by his order, dated 22nd October, 1963. Before passing this order the District Revenue Officer issued a notice to the petitioner in the writ petition on 24th September, 1963, to appear at the enquiry which was fixed to 3rd October, 1963, and state his objections. On 17th October, 1963, the writ petitioner filed an objection statement and also

prayed for fixing a suitable date to enable his Advocate to present his case in person. The District Revenue Officer, however, passed the final order on 22nd October, 1963. The present writ petition has been filed on the ground that the District Revenue Officer, the first respondent herein, has no jurisdiction to set aside the revenue sale, after its confirmation, no petition having been filed to set aside the sale under sections 37-A and 38 of the Revenue Recovery Act, nor any suit under section 59 having been filed. The main objection that is raised is that the Revenue Recovery Act is a self-contained enactment, containing the entire machinery for the holding of the sales and for confirmation or cancellation, as the case may be, and that the supervisory power of the Collector under Madras Regulation VII of 1828, cannot be availed of to revise the orders passed by the Deputy Collector. On the merits, the complaint of the petitioner is that the auction was held after observing all the formalities, that there was full publicity of the proposed sale by auction, that the objector, Munikanniah, the second respondent, was aware of the sale. He was also fully aware of the writ petitioner taking possession of the property and effecting considerable improvements investing large sums of money by levelling up the land and improving its soil, etc. The objection has also been raised that the proceedings of the District Revenue Officer offend the rules of limitation, and that in any event the sale ought not to have been set aside in its entirety when the objection by the second respondent regarding the validity or legality of the sale was only in respect of lands in which he was interested, namely, an extent of 91 cents. The petitioner has also made the complaint that the proceedings of the District Revenue Officer are opposed to principles of natural justice, as the petitioner was not given adequate opportunity to place his objections with all the materials, with the assistance of his Counsel and that the District Revenue Officer had acted with undue haste in having disposed of the matter even on 22nd October, 1963.

In the counter affidavits filed by respondents 1 and 2 the main stand taken is that the second respondent was not a defaulter and the revenue sale inasmuch as it included his land in P Nos. 11 and 18 was illegal as the revenue authorities have brought to sale all the properties included in S. No. 276 under a joint patta, over-looking that that includes not only the lands of the defaulter but lands of the other people who are not in arrears. On the legal question their contention is that the District Revenue Officer has undoubted powers of revision under Madras Regulation VII of 1828, and the same could be exercised even after the confirmation of the sale, and even if there was no petition under sections 37-A and 38 of the Revenue Recovery Act.

W. P. No 424 *of* 1964—This petition has been filed to quash the order of the Collector of Coimbatore, dated 16th May, 1963. The petitioner, herein, one Navaneethakrishnan Chettiar, purchased in a revenue sale certain properties of an extent of 11 87 acres, belonging to one Kandaswami Gounder, the defaulter. The Sub-Collector of Pollachi confirmed the revenue sale after over-ruling the objections raised by the defaulter by his petition, dated 7th February, 1962 The sale certificate was issued to the petitioner on 5th October, 1962. The defaulter took up the matter to the District Collector, Coimbatore who by his order, dated 16th May, 1963 set aside the sale. The petitioner preferred a petition to the Board of Revenue, objecting that the District Collector had no power to set aside the sale, and that the order was also bad inasmuch as the District Collector passed the order without notice to the petitioner. The Board of Revenue rejected this petition, on 3rd March, 1964 It is to quash the order of the District Collector, dated 16th May, 1963, that the present writ petition has been filed.

After this order of the District Collector, proceedings were taken in the civil Court. The writ petitioner, the auction purchaser, filed a petition under section 40 of the Revenue Recovery Act before the District Munsif, Udumalpet, praying for delivery of the property that was purchased by him, while the defaulter filed an application for recalling the warrant of delivery on the ground that the District Collector had set aside the sale. The District Munsif held that the District Collec-

tor had no jurisdiction to set aside the sale and directed possession to be delivered to the auction purchaser. On appeal the learned District Judge confirmed the decision of the District Munsif The defaulter has preferred Civil Miscellaneous Second Appeal No 139 of 1964, and alternatively a revision, Civil Revision Petition No. 2037 of 1964, against the order of the learned District Judge

Kailasam, J, called for a finding as to whether the District Collector while setting aside the sale gave notice to the writ petitioner Navaneethakrishnan Chettiar, and the District Munsif has submitted his findings (dated 31st May 1965), that the District Collector disposed of the appeal of the defaulter, and set aside the sale without notice to the present writ petitioner. The points raised in Writ Petition No. 424 of 1964 and Civil Miscellaneous Second Appeal No. 139 of 1964, and Civil Revision Petition No. 2037 of 1964 are the same, namely, the jurisdiction of the District Collector to set aside the revenue sale after it had been confirmed.

From the above narration of facts it will be seen that the points raised in Writ Petition Nos. 1225 of 1963 and 424 of 1964, relate to the stage at which the District Collector can exercise his powers, under the Revenue Recovery Act, of confirming, modifying or setting aside the order of the Revenue Divisional Officer, as well as the restriction on the power and the jurisdiction of the District Collector as to the period of limitation and the grounds on which the District Collector could interfere with the order of the Revenue Divisional Officer.

In Writ Petition No. 1027 of 1963, the point that is in dispute is whether the District Revenue Officer has any jurisdiction to interfere with an order passed by the Revenue Divisional Officer under section 7 of the Madras Hereditary Village Offices Act, imposing a punishment upon his subordinates In these proceedings we are not concerned with the powers of the Board of Revenue, appellate or revisional. Before proceeding further a brief reference to the salient provisions of the relevant enactments can be made

The first is the Madras Board of Revenue Regulations, 1803, Madras Regulation I of 1803, which was enacted to abolish or abrogate the judicial authority of the Board of Revenue in those districts where Zilla Courts had been established. The object of the enactment, at the same time, was to preserve and retain the power of the Board, in so far as it related to the executive administration of the public revenue. Sections 4 and 5 of that Regulation are clear to the effect that the powers of superintendence of the Board of Revenue and control over the subordinate authorities employed in the executive administration of the public revenue are confined to the executive administration and that this power of revision or superintendence or control will not extend to judicial matters.

The next is the Madras Regulation II of 1803, the Madras Collectors Regulation, which was enacted for describing and determining the conduct to be observed by Collectors as well as for defining the power and authority conferred upon the Collectors. The power of control and superintendence of the District Collector which is defined and contained in section 9 of this Regulation is on the same lines as that of the Revenue Board specified in section 5 of Regulation I of 1803. Section 9 of Regulation II of 1803, is practically the same as section 5 of Regulation I of 1803, with this difference that the word Collectors takes the place of the Board. In sections 60 to 64 and 67 of Regulation II of 1803, we find reference to Collectors and Assistants to Collectors.

Madras Regulation IV of 1822, and Madras Regulation III of 1823, were enacted empowering Collectors to deal with cases of malversation by subordinates in revenue affairs prescribing rules to be observed in the investigation of such cases and for recovery of money embezzled or corruptly received by public servants. The next important regulation is Madras Regulation VII of 1828, called the Madras Subordinate Collectors and Revenue Malversation (Amendment) Regulation, 1828 The purpose of the Regulation as indicated by the Preamble was to empower subordinate, Deputy and Assistant Collectors to exercise within their divisions all the powers of the Collector with regard to cases and proceedings under the Madras

Revenue Malversation Regulation, IX of 1822 But, section 3 of this Regulation, (VI I of 1828) which confers the power and authority upon the Subordinate, Deputy and Assistant Collectors, is significant in its language taking within its sweep not only matters (Malversation by subordinates) covered by Regulation IX of 1822, but variouso ther proceedings under other regulations and enactments then in force or that may be enacted in future. Section 3 has got a vital bearing upon the points tobe decided and it is necessary to set out the same.

> "3. First: A Subordinate, Deputy or Assistant Collector in charge of a particular division of a district shall ex-officio have authority to exercise within the division under his charge, all the *powers granted to Collectors* by the Regulations now in force, or that *may be hereafter enacted, unless the contrary shall be* expressly declared in any Regulation.
>
> Third : The proceedings of Subordinate, Deputy and Assistant Collectors acting under the preceding clauses shall be subject, *in all cases and in the fullest manner, to the superintendence, control and revision of* the Collector, who shall have power either to direct, generally, that the proceedings of any of his Subordinates, Deputies or Assistants shall be regularly submitted to himself before the decision, order or sentence is carried into execution, and to confirm, modify or annul them, or issue any further orders in the case, as he may see fit; or in any particular case to direct that the decision order or sentence of any of his Subordinates, Deputies or Assistants shall not be carried into execution, and to pass such further orders as he may see fit."

Even at this stage it is important to notice that so far as his district is concerned the entire responsibility is placed upon the Collector and in order to enable him to to effectively discharge his duties he is given an all embracing plenary power of control and superintendance over his Subordinates, Assistant Collectors, etc. This power of superintendence is expressly stated to be *in the fullest manner* and the Collector is conferred the power to confirm, modify or annul the decisions of his subordinates, and he is also clothed with the power to direct his subordinates to submit their proceedings for his scrutiny before such orders of subordinates are carried into execution or even to direct that the decision or order of the subordinates shall not be carried into execution. Another important aspect to be noticed in this Regulation is, this statutory conferment upon the Subordinate, Deputy and Assistant Collectors of all the powers granted to the Collectors under the law include expressly laws in force then, as well as laws that may be enacted in future unless there is any express indication to the contrary in any of these laws either then in force or to be enacted in future.

The next is Madras Act VII of 1857, which provides for the appointment of Deputy Collectors and Deputy Magistrates and the conferment upon the Deputy Collectors of the powers of the District Collector as may be assigned to him from time to time by the Collector of the District, subject to the proviso that the same shall be subject to the same control in all respects as in the case of a covenanted Assistant Collector.

The Madras Deputy Collectors Act VII of 1914, was enacted repealing Madras Act VII of 1857. At the same time it provided that the expressions *Sub-Collector and Assistant Collector* in section 3 of Madras Regulation VII of 1828, shall include and be deemed always to have included the Deputy Collector appointed under Madras Act VII of 1857 The effect of these Laws and Regulations is that the Assistant Collector, Sub-Collector and Deputy Collectors have been empowered to exercise all the powers granted to the Collectors subject to the wide power of superintendence, control, and revision by the Collector under section 3 of Regulation VII of 1828.

The next in order comes the Madras Revenue Recovery Act II of 1864. It purports to be a consolidating legislation concerning recovery of arrears of revenue

of the State of Madras and Regislations I and II of 1803 are declared to be inoperative as respects arrears of revenue recoverable under this Act II of 1864. Sections 25 to 44 of this Act deal with the procedure for the recovery of arrears of revenue by attachment and sale of the immovable property, setting aside of such sales, delivery of possession and such connected matters Section 37 provides that if the defaulter makes a tender of the arrears before the date of the sale, the sale shall be stayed. Section 37-A provides for the setting aside of the sale of the immovable property on deposit (by any person owning or claiming an interest in the immovable property sold) the amount of the arrears of revenue and other miscellaneous amounts mentioned therein. Section 38 provides for the setting aside of the revenue sale in case an application is made to the Collector within thirty days from the date of the sale on the ground that the sale is vitiated by some material irregularity, mistake or fraud in publishing or conducting the same, subject to the proviso that the Collector should be satisfied that the applicant has sustained substantial injury by reason of the irregularity or the mistake. Section 38 (3) reserves to the Collector a residuary power to set aside the sale. As there is serious controversy about the precise ambit of the Collector's powers it is necessary to set out the same.

Section 38 (3) :

" On the expiration of thirty days from the date of the sale, if no application to have the sale set aside is made under section 37-A or under clause (1) of this section or if such application has been made and rejected, the Collector shall make an order confirming the sale; provided that, if he shall have reason to think that the sale ought to be set aside notwithstanding that no such application has been made or on grounds other than those alleged in any application which has been made and rejected, he may, after recording his reasons in writing, set aside the sale."

Section 38 (5) provides for the issue of a certificate of sale by the Collector to the purchaser and for registering the lands sold in the name of the purchaser after the confirmation of the sale. Section 39 provides for the publication in the villages in which the land sold may be situated and in the office of the Taluk and in the District Gazette details about the revenue sale, name of the purchaser, etc. Section 40 provides the machinery for invoking the assistance of the civil Courts of competent jurisdiction for putting the purchaser in possession. Section 44 provides that the Collector or other officer empowered by the Collector in this behalf may sell the entire land or a portion of the same for the recovery of the arrears subject to the proviso that so far as may be practicable no more land should be sold than may be sufficient to discharge the arrears of revenue and expenses of the same The next important provision of this enactment is section 59 which saves the rights of aggrieved persons to seek redress in a civil Court subject to the limitation that civil Courts shall not entertain any suit unless the same is instituted within six months from the time at which the cause of action arose.

Reference may next be made to the Hereditary Village Offices Act, Madras Act III of 1895, which repealed Regulation VI of 1831. This Act was enacted to provide for the appointment and succession to hereditary village officers, for the hearing and disposal of claims to such offices and emoluments annexed thereto, and for punishment of village officers for misconduct, neglect of duty etc. The village officers were classified into several groups. Section 7 provides for disciplinary proceedings and the procedure to be adopted by the Collector in such proceedings Section 7 (*a*) and (*b*) confer the power upon the Collector to impose various punishments, fine, suspension, dismissal and removal of the village officer concerned. Section 10 confers the power upon the Collector to fill any vacancy that may occur subject to the conditions specified therein. Section 10 (5) provides the procedure to be adopted for appointing a deputy if the office-holder for the time being happens to be a minor. Section 10 (6) provides for filling up of vacancy caused on resignation, dismissal, removal or suspension. Section 13 provides for a right of suit before the Collector for the establishment of a right to the office

and for the recovery of the emoluments Section 15 confers the power upon the District Collector to transfer to his own file any suit on the file of the Revenue Officer in charge of a division of a district or from the file of one such officer to that of another or to the file of an Assistant or a Deputy Collector not in charge of a division. Section 18 provides the machinery by which the officer who is seized of the proceeding is empowered to obtain the decision of the Board of Revenue in the contingencies referred to therein. Section 23 (1) provides for an appeal to the District Collector from every order passed by the Collector under section 6 or 7 and from every decree or order passed by a Collector in a suit preferred under section 13, the time limit being one month. If the said order or decree was passed by the District Collector a right of appeal to the Board of Revenue within a period of three months is also given and the decision of the District Collector on an appeal or that of the Board as the case may be is made final. Proviso to section 23 (1) provides that in the case of the head of the village and the village accountant a second appeal shall lie to the Board of Revenue (within three months) against the decision of the District Collector on appeal (*a*) in suits preferred under section 13 or (*b*) dismissing or removing such a village officer. Section 23 (2) provides for an appeal against an order passed by a Tahsildar or Deputy Tahsildar within a period of one month to the Collector. Section 24 contains the provision that when an appeal is filed before the District Collector or Collector in respect of any decision rendered by him in another capacity, he shall report the fact to the Board of Revenue or to the District Collector as the case may be, and the appeal shall be disposed of by the said Board or the District Collector and the order passed in such appeal shall be final. It may be noticed that in this Act reference is made to the Collector and the District Collector without any definition of the same. The Madras General Clauses Act (I of 1891) defines the Collector as including every officer, who for the time being, is authorised to exercise the powers of the Collector. District Collector is defined as meaning the chief local officer-in-charge of the revenue administration of a district.

The question whether there is any conflict between the two Full Bench decisions of this Court, *Chittayya* v. *Secretary of State for India*[1] and *Nagarathinammal* v. *Ibrahim Sahib*[2] may be first disposed of. The Full Bench in *Chittayya* v. *Secretary of State for India*[1] was constituted to resolve the conflict between two earlier Bench Decisions, *Gnanasambandha Pandara Sannadhi* v. *David Nadar*[3] and *Brahmayya* v. *Pappa Setty*[4]. In *Gnanasambhanda Pandara Sannadhi* v. *David Nadar*[3], there was a revenue sale and the same was confirmed by the Deputy Collector in charge of the division after dismissing an application to set aside the sale and possession of the property was also delivered to the purchaser, while an appeal to the District Collector was pending against the confirmation of the sale by the Deputy Collector. The District Collector on appeal set aside the sale and an application was made to the Munsif to redeliver the property to the owner (defaulter) On behalf of the purchaser it was argued that once a certificate of sale was granted by the Deputy Collector, the power of the Collector came to an end. But this argument was not accepted. It was held that the power which the Deputy Collector derived under clause (1) of section 3 of Madras Regulation VII of 1828, was subject to the complete control of and supervision and revision by the Collector of the District under clause (3) of section 3 of Regulation VII of 18828, by which the Collector may confirm, modify or annul the order of his subordinate. The Bench pointed out that the only authority entitled to act in such matters, *i.e.*, revenue recovery proceedings, is the Collector of the District and that the power of the subordinates of the Collector to deal with such matters is derived *altogether from outside the Act*, Madras Act II of 1864, that the power is derived only under Regulation VII of 1828, and that, that power in express language of its conferment is subject to the paramount power of revision of the District Collector. In *Brahmayya* v. *Pappa Setty*[4] the Revenue Divisional Officer confirmed the sale and later on, when he noticed some irregularity

1 (1931) I.L.R. 55 Mad. 453 (F.B.) . 62 M.L.J. 49
M.L.J. 592.
2. I.L.R. (1955) Mad. 460 (F.B.) (1955) 2 M.L.J. 592.
3 (1904) 14 M.L.J. 433.
4. (1921) I.L.R. 51 Mad. 695 : 55 M.L.J. 33

he himself wrote to the District Collector for setting aside the sale and the sale was accordingly set aside. The attention of the Bench was not drawn to the previous Bench Decision, *Gnanasambandha Pandara Sannadhi* v *David Nadar*[1] and it was held that the Revenue Divisional Officer is a Collector within the meaning of sections 37-A and 38 of the Madras Revenue Recovery Act, that the Revenue Divisional Officer, therefore, was the only officer to confirm the sale or set aside the same, that when he did not set aside the sale under section 38 (3) the sale became final and unimpeachable, and that the District Collector had no jurisdiction to set aside the sale relying on the general powers of revision under Madras Regulation VII of 1828. It was also held that the provisions of the Revenue Recovery Act are complete and cannot be affected by a General Act, like Regulation VII of 1828.

In view of this conflict the Full Bench in *Chittyya* v. *Secretary of State for India*[2] was constituted and in a very brief judgment the correctness of the view of the earlier Bench in *Gnanasambandha Pandara Sannadhi* v *David Nadar*[1] was approved on the ground that the later Bench Decision in *Brahmayya* v. *Pappa Setty*[3] proceeded upon a misconception that the definition of a Collector in the General Clauses Act applied to Regulation VII of 1828, or to the Revenue Recovery Act It will thus be noticed that the short or limited question which the Full Bench had tlo consider related to the jurisdiction of the District Collector to set aside a sale under section 38 (3) of the Revenue Recovery Act read with section 3 (3) of Madras Regulation VII of 1828, when the Revenue Divisional Officer has already confirmed the sale.

The reference to the Full Bench in *Nagarathinammal* v. *Ibrahim Sahib*[4] arose an account of the doubts entertained about the correctness of the view taken by an earlier Bench of this Court, consisting of Govinda Menon and Basheer Ahmed Sayed, JJ., in an unreported case, Letters Patent Appeal No. 225 of 1952, concerning the powers of revision of the Board of Revenue in a proceeding under the Madras Hereditary Village Offices Act (Act III of 1895). In *Nagarathinammal* v. *Ibrahim Sahib*[4] on the vacancy caused by a permanent hereditary karnam the Sub-Collector recognised the minor son as the office-holder and appointed a Muslim to be the deputy. The mother preferred an appeal to the District Collector who set aside the same and directed the Sub-Collector to appoint some other nominee. This Muslim deputy preferred a revision petition to the Board of Revenue which set aside the order of the Collector and confirmed the Muslim as deputy. The mother preferred a revision petition to the Government which declined to interfere on the ground that they had no powers of revision. A writ petition was filed by the mother to quash the order of the Board of Revenue on the ground that it (the Board) had no jurisdiction to interfere with the order of the District Collector.

From the above it will be seen that the only point that arose for decision in that case related to the powers of revision of the Board of Revenue. It was held that under section 5 of the Board of Revenue Regulation I of 1803, the power of superintendence and control of the Board of Revenue was limited to the executive administration of the revenue, and that under the guise of superintendence and control over persons employed in the executive administration the Revenue Board cannot give instructions to the subordinate authorities in respect of other matters. After an examination of the provisions of the various enactments (referred to earlier in this judgment) the Full Bench held at page 469 that the holders of offices governed by Act II of 1894, or Act III of 1895, cannot in relation to their office be dealt with, except in the manner provided by the relevant statute, and that

"Neither the Revenue Divisional Officer, nor the District Collector, nor the Board of Revenue can touch them, except in the manner that the statute permits."

It was pointed out that

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1. (1904) 14 M L J 433
2. (1931) I L R. 55 Mad. 453 (F.B) 62 M.L.J. 592.
3. (1921) I L R 51 Mad 695 55 M L J 33.
4. I L.R. (1955) Mad. 460 . (1955) 2 M.L.J. 49.

"Where a Statute takes over and occupies a field previously not regulated by legislation, the rights and the powers conferred and the obligations imposed by the Statute must be worked out within the statutory framework."

It was also held that the Board of Revenue has no general powers of supervision or revision as such a power is not conferred under Act III of 1895. The Full Bench pointed out that though an appeal before the District Collector in respect of an order of appointment of a deputy under section 10 (3) would not lie, the order of the District Collector could be treated as *intra vires* as an order in revision by virtue of section 3 (3) of Regulation VII of 1828. It is important to notice that in recognising the power of revision of the District Collector under Regulation VII of 1828, the Full Bench referred with approval to the two Bench Decisions of this Court, *Srinivasa Ayyangar* v. *Jagannatha Aiyangar*[1] and *Seshagiri Sarma* v. *State of Madras*[2] in which the revisional power of the District Collector was upheld by virtue of Regulation VII of 1828. There is no conflict between *Chittayya* v. *Secretary of State for India*[3] and *Nagarathinammal* v. *Ibrahim Sahib*[4] The two decisions dealt with two different enactments, though in both, the scope of powers of the District Collector under Regulation VII of 1828, came up for discussion. The important point to be noticed is that such observations as are made in the judgment of the later Full Bench only support the *ratio decidendi* in the earlier Full Bench decision *Chittayya* v. *Secretary of State for India*[3] though there was no specific reference to that decision. In other words, far from the later Full Bench revealing any divergent note, the trend of reasoning therein, so far as the power of revision of the District Collector under Regulation VII of 1828 is concerned is on the same lines as the earlier Full Bench.

The Full Bench decision in *Chittayya* v. *Secretary of State for India*[3] is binding upon this Bench as constituted and it directly governs Writ Petition Nos. 1225 of 1963 and 424 of 1964. But as the judgment therein is very brief containing no discussion and as it simply affirms the correctness of the earlier Bench Decision in *Gnanasambanda Pandara Sannidhi* v. *David Nadar*[5] over-ruling the later Bench decision in *Brahmayya* v. *Pappa Setty*[6] we permitted learned Counsel (appearing on all sides) to address arguments as they wanted an opportunity to convince us that the Full Bench decision in *Chittayya* v. *Secretary of State for India*[3] may have to be referred to a fuller Bench as requiring reconsideration. In this Judgment we are dealing with these arguments only in that particular context and for that limited purpose of expressing our opinion that *Chittayya* v. *Secretary of State for India*[3] does not require reconsideration.

Mr. V. K. Thiruvenkatachari, the leading Counsel for the petitioners stressed the following points. The Madras Revenue Recovery Act is a self-contained enactment, that the entire procedure or machinery as well as the jurisdiction and the power of the Collector to set aside or confirm a sale are contained in section 37-A and section 38, that apart from those provisions, there is no other residuary power in the exercise of which the District Collector could set aside a revenue sale. If no application to set aside the sale had been made within the time limit of thirty days from the date of the sale (barring cases of fraud under section 18 of the Limitation Act, which would give an extended period after the discovery of the fraud) and if the sale had been confirmed by the Sub-Collector the purchaser could not be deprived of the valuable rights that have accrued to him by the exercise of the revisional power by the Collector at any time he so pleases. This power of superintendence, control and revision which is reserved to the Collector under Regulation VII of 1828, is only to operate as a check and control over the acts and decisions of Subordinate or Assistant Collectors, so that they would act strictly in conformity with and within the limits of the several Regulations and Acts. As this is the sole object of the reservation of the power of superintendence and revision, the District Collector will have no jurisdiction to interfere with such acts ar decisions of the Subrodinate or Assistant Collectors, if their acts or decisions in enforcing or administering the

1 (1938) 2 M.L.J. 488
2 (1952) 2 M.L.J. 462
3 (1931) I.L.R. 55 Mad. 453 (F.B.): 62 M.L.J. 592.
4 I.L.R. (1955) Mad. 460 (1955) 2 M.L.J. 49
5 (1904) 14 M.L.J. 433
6. (1951) I.L.R. 51 Mad. 695 . 55 M.L.J. 33.

several laws are not vitiated by any error of law or fact or illegality or irregularity. If the Sub-Collector confirms the sale either after dismissing an application filed to set aside a sale on the ground of some material irregularity, mistake or fraud under section 38 (1) or on the ground that he saw no reason to set aside the sale under the proviso to section 38 (3) the District Collector cannot interfere with that decision under Regulation VII of 1828 Learned Counsel urged that section 3 (3) of Regulation VII of 1828, cannot have an independent operation and that the power of the District Collector should be exercised in harmony with the scheme and the provisions of the Revenue Recovery Act. Recognition of any residuary power (in the Collector) not subject to any limit of time, or any other restriction with regard to the actual incidents of the sale, would defeat and cut at the root of security of title acquired in revenue sales If the title acquired under the revenue sale were to be so precarious and indefinite as being exposed to this risk of being set aside or cancelled by the District Collector at any time he so pleases and without any restriction, nobody would purchase any property in a revenue sale with the result that the purpose of the Revenue Recovery Act would be frustrated and arrears of revenue could never be realised.

In support of this contention, learned Counsel placed reliance upon a later Full Bench decision of this Court in *Venkatanarasimha Charyulu* v. *The Secretary of State for India*[1] and the observations at page 267, suggesting the view that if the Subordinate Collector has confirmed the sale the only remedy is that the power of the District Collector under Regulation VII of 1828, must be invoked within thirty days or in the case of fraud within thrily days after the discovery of such fraud.

We are not inclined to accept this contention as the several limbs thereof are contrary to the plain language of the provisions, section 38 of the Revenue Recovery Act and section 3 of Regulation VII of 1828. While determining the legality of the order of the District Collector which sets aside or modifies the decision of the Assistant or the Sub-Collector the question has to be considered with respect to three distinct separate aspects : (i) When the Revenue Divisional Officer *ex-officio* exercises the powers of the Collector, is there any restriction or limit as to the time or the circumstances under which a sale can be set aside or confirmed by the Revenue Divisional Officer? (ii) If the Revenue Divisional Officer has confirmed or set aside the sale and if the District Collector is of the contrary view, is there any time-limit within which the District Collector should exercise the powers of revision expressly reserved under section 3 (3) of Regulation VII of 1828? (iii) Has the District Collector any jurisdiction to interfere with the order of the Revenue Divisional Officer even when the former is setisfied that the act done or the decision rendered by the Revenue Divisional Officer is correct and is in conformity with the provisions of the Revenue Recovery Act?

As regards aspect (iii) it has to be recognised that even though the power of superintendence, control and revision reserved to the Collector under section 3 (3) of Regulation VII of 1828, is in very wide terms and the proceedings of the Subordinate or Assistant Collector are subject to revision *in the fullest manner* a restriction has to be imposed as necessarily flowing from the provisions of the particular statutes which the Subordinate or Assistant Collector enforces or administers. The wide language employed in section 3 (3) of Regulation VII of 1828, does not mean that the Collector can pass any order which the Subordinate or Assistant Collector could not himself have passed under section 38. The power of revision would extend only to the limit of enabling the District Collector to substitute his own order which he would have passed within the framework of the Revenue Recovery Act and within the strict limits and subject to the provisions of sections 38 (1) and 38 (3). In this connection reference may be made to the two recent decisions of the Supreme Court arising under the provisions of the Motor Vehicles Act in *Arunachalam Pillai* v. *M/s. Southern Roadways Ltd*[2] and *Abdul Mateen* v. *Ram Kailash*[3].

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1. I.L.R. (1942) Mad. 264 (F.B.) . (1941) 2 M.L.J. 904

2. (1941) 1 S.C.J. 421 (1960) 3 S.C.R. 764: (1961) 1 M.L.J. (S.C.) 104: (1961) 1 An. W.R. (S.C.) 104 A.I.R. 1960 S.C. 1191.

3. (1963) 3 S.C.R. 523 A.I.R. 1963 S.C. 64.

In *Arunachalam Pillai* v *M/s Southern Roadways Ltd* [1], the Supreme Court had to consider the scope of the power of revision which was vested in the State Government under section 64-A of the Motor Vehicles Act (Madras Amendment) The argument was that the provision empowering the Government to pass such orders in reference thereto as it thinks fit is very wide in expression and does not admit of any limitation The Supreme Court rejected this argument holding that however wide the expression may be, it does not mean that the State Government could pass an order in exercise of revisional jurisdiction which the authority whose order the Government was revising had no jurisdiction to pass The Supreme Court observed that no such unrestricted authority was vested in the Government and that the words as it thinks fit must mean within the ambit of the provisions of the Act In the later decision, *Abdul Mateen* v *Ram Kailash*[2] the Supreme Court had to consider the ambit of the power of revision of the State Government under section 64-A (Bihar Amendment) of the Motor Vehicles Act That section provided that

> " the State Government may, on an application made to it in this behalf within thirty days of the passing of the order, in the course of any proceeding taken under this chapter by any authority or officer subordinate to it, call for the records in such proceeding and after examining such records pass such orders as it thinks fit."

After referring to the earlier decision in *Arunachalam Pillai* v *M/s Southern Roadways Ltd* [1], the Supreme Court pointed out that when the revisional power is exercised the revisional authority is as much subject to the statutory provisions in the Motor Vehicles Act as the subordinate original authority, *i e*, the Regional Transport Authority It was emphasised that while dealing with a revision, the State Government must act in the same manner, as the Regional Transport Authority and its order will be subject to the same restrictions as those imposed upon the Regional Transport Authority.

Reference may also be made to the following oft-quoted observations of Lord Summer in *Rex* v. *Nat Bell Liquors Limited*[3]

> "Its jurisdiction, is to see that the inferior Court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would itself in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined That supervision goes to two points ; one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise , the other is the observance of the law on the course of its exercise "

We may also refer to the observations of Bhashyam Ayyangar, J, in *The Secretary State for India* v. *Kasturi Reddi*[4]. In that case it was held that if a dharkast grant has been made by a Subordinate Revenue Officer, acting within the scope of his authority, and if the same has been confirmed by the appropriate appellate authority, his action or decision cannot be set aside by the Government After referring to section 3 of Regulation VII, and in particular the clause

> " Shall be subject, in all cases and in the fullest manner, to the superintendence, control and revision of the Collector ",

the learned Judge observed that when the Revenue Divisional Officer *ex-officio* exercises the power of the District Collector, the respective actions of the Subordinate Revenue Officers, are not subject to any control other than that specially provided by the dharkest rules.

We are of the clear opinion that the power of revision of the District Collector is confined to the ambit of the provisions of the Act and cannot extend to collateral matters or objects alien to the enactment in question. For instance, it would not

1. (1961) 1 S C J. 421 : (1960) 3 S C R 764 (1961) 1 M.L J. (S C) 104 . (1961) 1 An. W R (S C.) 104 : A.I R. 1960 S C 491
2. (1963) 3 S C R 523 A I R. 1963 S C. 64.
3. L R (1922) 2 A C. 128, 156.
4. (1902) I L.R. 26 Mad. 268 : 12 M.L.J. 453.

be competent to the District Collector to set aside the order of the Revenue Divisional Officer, because, he so pleases, even though he is of the opinion that the decision of the Sub-divisional officer is in perfect conformity with the provisions of the Act and if the District Collector himself was seized of the proceeding under section 38 (instead of the Revenue Divisional Officer) right from its inception, he would have passed an identical order. Relying upon the wide language in section 3 (3) of the Regulation, the District Collector cannot exercise an undefined, unrestricted or an unlimited plenary power outside the provisions of the Revenue Recovery Act For instance, he cannot set aside the revenue sale because the purchaser belongs to a particular community, or to a particular political party or he already owns a vast extent of property in that locality or village. These are totally extraneous considerations, having nothing whatsoever to do with the object or the purpose of the Act or its scheme The correct legal position is that wherever the legality or the correctness of the order of the District Collector passed in revision under section 3 of Regulation VII is questioned, it must be shown that the District Collector acting within the scope of his authority could have himself passed the order in question, if he had acted as the original authority. His decisions, should conform to the limitations and restrictions whether they may be express or arising by necessary implication in the context of section 38.

We shall now take up for consideration, aspect No 1, *i e*, the authority and jurisdiction of the Revenue Divisional Officer when he acts under section 38 Section 38 contains two limbs. It provides a right to the party aggrieved to apply within thirty days from the date of the sale to set aside the same on the ground of material irregularity, mistake or fraud The Revenue Divisional Officer can pass appropriate orders thereon, either setting aside the sale or confirming the same The proviso to section 38 (3) confers the power to set aside the sale even if no application had been made or even if an appl cation has been made and rejected, on grounds other than those alleged in such an application. For exercising this power, under this proviso there is no time limit specified After the expiry of thirty days from the date of the sale, the aggrieved party losses the statutory right; but it is still open to the Revenue Divisional Officer to set aside the sale if he is satisfied that there are sufficient reasons, germane and relevant, to the provisions of the Act After the revenue sale is confirmed, the Revenue Divisional Officer, may come to know that the revenue sale was a fraudulent one, in the sense, that there was a conspiracy between the defaulter and the purchaser, as a result of which the property was sold without due publicity, resulting in loss to the Government. When large arrears were due to the Government valuable property would have been manoeuvred to be purchased for a ludicrously low or inadequate price leaving still a large sum by way of arrears after realisation of the sale proceeds. It may be that the valuable property sold is the only property of the defaulter, with the result that the Government's chances of recovering the balance of arrears still due would be complectely lost; or it may be that the revenue sale was so manoeuvred as to defeat the rights of encumbrancers of persons who have attached the property of the defaulter and, the purchaser and the defaulter may both be interested in defeating the claims those persons One can visualise various circumstances under which the Revenue Divisional Officer, may deem fit to set as de the sale either for purposes of protecting the interests of the State, or where the machinery of the Revenue Recovery Act has been abused in a fraudulent manner The only restriction is, that the residuary power should be exercised only to effectuate the purposes and the object of the Act. When the Deputy Collector confirms a sale he may be totally ignorant and unaware of the fraud or conspiracy and if his prior confirmation of the sale should operate as a bar to the exercise of the power, the proviso would become futile and illusory Such instances will no doubt be rare and it is only to provide for such contingencies that this power is reserved The further enlargement of time, in the case of fraud by the operation of section 18 of the Limitation Act would serve only a limited purpose, *i e*, when private parties are aggrieved by revenue sales In a case where the interests of the State suffer by a fraudulent sale for an inadequate or low price, there is no question of an application to set aside the sale, and it is the duty of the Revenue

Divisional Officer to set aside the same when he becomes aware of, the fraud and the conspiracy. It is true, that in the proviso nothing is mentioned as to the *grounds* other than those alleged in the application which has been made and rejected One view to take may be that the grounds on the basis of which, though not alleged in the application, the sale may be set aside by the Deputy Collector, must be any one of the grounds mentioned in section 38 (1) The other view is, that it may be *any ground*, but subject, however to the important condition that such ground though not covered by section 38 (1) must not be foreign to the purposes of the Act

In *Narayana Chettiar* v. *Secretary of State for India*[1], the Sub-Collector confirmed the revenue sale as there was no application under section 38 (1) An attaching creditor filed an application under Regulation VII before the Collector who set aside the Sub-Collector's order of confirmation of sale, on the ground of some mistake in the description of the property, and that the property was wrongly sold in one lot instead of two lots as garden and house, and that the price fetched was very low A suit to set aside this order of the District Collector was filed and the same was dismissed by the Courts below On Second Appeal, this dismissal was confirmed by Horwill, J , upholding the power of the District Collector in setting aside the confirmation of the sale of the Sub-Collector. The learned Judge observed that when the Collector set aside the sale under section 38 (3), his powers are *very much wider than those of section* 38 (1) *and the sale can be set aside for very many more grounds than those mentioned in section* 38 (1) The learned Judge also observed that all that is necessary under section 38 (3) before setting aside the sale is that the Collector should have reason to think that the sale ought to be set aside, and that, if the Collector had given any substantial reasons why the sale should be set aside his order is good and it is not necessary that the District Collector should find a material irregularity or that the price was unduly low.

This decision was rendered prior to the Constitution. Now, the question may arise, whether the conferment of such a wide power without indicating the proper guiding principles would not be unconstitutional as being arbitrary The power under the proviso will be valid if the *other grounds* specified therein are restricted to the purposes and the scheme of the Act It is unnecessary for us to express our final opinion as in the instant case the sale was setas de by the Collector for reasons covered by section 38 as property of a person who was not a defaulter had been sold A party is not as of right entitled to ask the Sub-Collector to set aside a sale under the proviso to section 38 (3), if he does not exercise his right to apply to set aside the sale within one month under section 38 (1) The power reserved under the proviso, is in the exercise of the discretion of the authority. The authority may refuse to exercise the power if the party aggrieved is guilty of laches or had slept over his rights or had encouraged the purchaser to make investments and improvements in the property involving large capital. The authority may refuse to interfere if such interference would result in injustice or affect rights of innocent third parties, who might have subsequently purchased the property for valuable consideration These are all considerations which should weigh with the authority concerned Even so, we are not prepared to read into the proviso any time limit beyond which this power cannot be exercised, especially when in the same section a time limit of one month is fixed in the case of an application and no such time limit is mentioned in the proviso. Similarly in the case of a right of suit under section 59 of the Act a time limit has been fixed. For all these reasons we are of the view that the Sub or Deputy Collector will have jurisdiction to set aside the sale even after confirmation.

From the foregoing it necessarily follows, and it is *a fortiori*, that (aspect No 2) there can be no time limit within which the District Collector should or could exercise his powers of revision In this connection it must be borne in mind that as observed by the Bench of this Court in *Gnanasambandha Pandara Sannadhi* v *David Nadar*[2] "*The Power of the Subordinates of the Collector to deal with Revenue sales has to be derived altogether from outside the Act*" (II of 1864) and is derived only from the

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1 (1941) 1 M.L.J. 543. 2. (1904) 14 M L J 433.

Regulation, either expressly or by necessary implication arising out of the enforcement of the provisions of the Revenue Recovery Act (II of 1864). There is no express time-limit in the Regulation If confirmation of the sale by the Revenue Divisional Officer is fixed as the time limit, the power of revision of the District Collector will become useless and illusory in a vast majority of cases The District Collector in the normal course may not be aware of the proceedings of the Sub or Deputy Collector. The sale would have been confirmed by the Sub-Divisional Officer though vitiated by his wrong or improper application of the provisions of the Revenue Recovery Act, or as a result of some fraud and conspiracy between the defaulter and the purchaser The interests of the State would suffer if the confirmation of the sale by the Deputy Collector is to be treated as final Further, the party aggrieved would have applied to the Deputy Collector to set aside the sale but his application would have been dismissed and the sale automatically confirmed If the expiry of the time-limit is to operate as a bar preventing the party from invoking the powers of revision of the District Collector, the erroneous or wrong order of the Revenue Divisional Officer would become final, a result, which would cut at the very root of the reservation of the power of revision to the Collector under section 38 (3) of Regulation VII In the case of revenue sales there are various stages It cannot be denied that it will be open to the District Collector to intervene at any stage and direct the course of the proceedings in the exercise of his powers of revision The District Collector can himself take up the entire matter or may give directions to the Sub-Collector to proceed in a particular manner For instance, he may give directions regarding the fixing the date of sale, regarding the publicity of the sale, the parcelling out of lands and fixing the lots of the sale or even granting time to the defaulter to pay the arrears in instalments We are unable to see why any particular significance should be attached to the act of confirmation, as distinguished from the other steps taken by the Sub-Divisional Officer. Everyone of his acts including the act of confirmation would be subject to the revisional power of the District Collector at any stage We have no hesitation in holding that far from the confirmation of the sale by the Sub-Collector operating as a time-limit the power of the District Collector to set aside a sale must be recognised at any stage, and only then the main object underlying the Regulation would be achieved Any other view would result in strange and absurd results virtually making the Sub-Collector the head of the Revenue Administration in the district

The legal position would be the same even if it should be held that under aspect No 1, the Revenue Divisional Officer will have no power to set aside the sale under the proviso to section 38 (3) once he has confirmed it If the revenue sale is such that it ought not to have been confirmed and by such confirmation the power of the Deputy Collector to set aside the sale on other grounds is extinguished, the District Collector under the powers of revision is entitled to set aside the revenue sale for the reasons mentioned in the proviso to section 38 (3)

If the contention of Mr. V. K. Thiruvenkatachari that once a Deputy Collector confirms the sale he cannot retrace his steps under the proviso to section 38 (3) were accepted, it would result in the anomaly that the Revenue Divisional Officer passing a wrong order and committing a mistake in confirming the sale deprives himself by his own mistake of the power to proceed under the proviso. That apart, the District Collector does not labour under any such restriction or disability The power of revision of the District Collector is derived under Regulation (VII of 1828) and it extends over every stage of the proceeding of the Deputy Collector If the District Collector takes the view that an application to set aside the sale was wrongly dismissed by the Deputy Collector resulting again in a wrong order of confirmation and if the District Collector allows the application to set aside the sale, the act of confirmation by the Deputy Collector would also get vacated. By the same process of reasoning if the Deputy Collector in a particular case should have acted under the proviso to section 38 (3) but he had failed to do so, the District Collector will have ample jurisdiction to act under the Regulation. We are of the clear opinion that so far as the District Collector is concerned, there is no limitation or restriction

on his powers to revise the orders of the Subordinate Collector except that it should be for effectuating the purposes of the Act Long lapse of time, consequent appreciation in prices, negligence and laches of the party aggrieved, the conduct of the party giving rise to equitable estoppel, intervention of rights of third parties, who have become *bona fide* transferees for valuable consideration, and who have invested large sums of money by way of reclamation and improvement of lands or putting up buildings are all circumstances which will be taken into account by the District Collector when exercising his powers of revision. The undoubted authority and jurisdiction should not be mixed up with the discretion involved in the exercise of the same The wider the power the greater is the circumspection and discretion required in exercising it.

It only remains to refer to the Full Bench decision *Venkatanarasimhacharyudu* v. *Secretary of State for India*[1] on which considerable reliance was placed by V K Thiruvenkatachari in support of his contention that there is a time-limit for applying to the District Collector for redress regarding a revenue sale In that case a revenue sale vitiated by fraud and collusion took place on 18th July, 1932, and was confirmed by the Deputy Collector on 28th September, 1932. The party aggrieved, discovered the fraud on the 15th of November, and applied to the Collector on the 18th November to set aside the sale. The Collector by his order, dated 30th June, 1933, declined to interfere The aggrieved party filed the suit on 18th July, 1933 The main point that arose for decision in that case related to the question of limitation under section 59 of the Act which provides that an aggrieved party may file a civil suit within a period of six months from the time at which the cause of action arose. In second appeal Venkatarama Rao, J , was inclined to take the view that time would commence to run only after the sale became finally confirmed, namely, the order of the District Collector dismissing the application of the aggrieved party, and not from the date when the Deputy Collector confirmed the sale The learned judge was of the view that this view of the scope of the section followed from the leading decision of the Privy Council in *Baijnath Sahai* v. *Ramgut Singh*[2].

The learned Judge, however, feeling himself bound by a later decision of this Court in *Chinnammal Achi* v. *Saminatha Malavarayan*[3] held that the time commenced to run from the earlier date, *i e* , the date of the order of the Deputy Collector but granted a certificate under clause 15 of the Letters Patent The matter came up before the Full Bench[1] which over-ruled *Chinnammal Achi* v *Saminath Malavarayan*[3] and held that the cause of action arose only when the sale became finally confirmed by the order of the District Collector From the above narration it will be seen that the direct point which arose for decision was altogether different and the Full Bench had not to consider whether there was any time limit within which the District Collector should exercise his power under Regulation VII. The following observation in[1] at page 267 :

> "The fact that a Subordinate Collector has confirmed the sale does not, however, prevent an aggrieved party from taking advantage of clause 3 (3) of the Regulation of 1828 and in case of fraud he has thirty days from the discovery of the fraud in which to apply to the Collector for redress",

only deals with the right of the party aggrieved to apply to set aside the sale The party could well have applied to the Sub-Collector himself for setting aside the sale invoking the provisions of section 18 of the Limitation Act on the ground of fraud but he applied to the District Collector. In that case the application to set aside the sale was in time as section 18 of the Limitation Act was rightly invoked. The Full Bench did not have to consider whether there was any restriction as to time as to the exercise of the revisional power by the District Collector. In other words, the whole discussion proceeded on the footing that the District Collector had within time exercised the power of revision under section 3 (3) of the Regulation, the only question being as to the point of time at which the cause of action arose We are,

1. (1941) 2 M L J 904 I.L.R (1942) Mad 264
2. (1896) L.R 23 I A. 45 . I L R 23 Cal 775 (P C.)
3. (1907) I L R. 30 Mad 367

therefore, unable to agree with Mr. V K. Thiruvenkatachari that this decision supports his extreme contention

It is also important to observe that the observations of the Full Bench in *Nagarathnammal* v. *Ibrahim Sahib*[1] concerning the esact scope of the decision of Satyanarayana Rao, J , in *Venkatasubba Rao* v. *Ananda Rao*[2], tend to the same view that we have expressed above In *Venkatasubba Rao* v. *Ananda Rao*[2], the question arose about the correctness of the order of the District Collector setting aside the order of the Revenue Divisional Officer appointing a deputy under section 10 of the Madras Hereditary Village Offices Act Dealing with the power of the District Collector under section 3 of the Regulation of 1828, Satyanarayana Rao, J., took the view, that once the order of the Sub-Collector has been carried into execution the District Collector should not undo what has been done by his subordinate and that it did not matter how the proceedings of the Sub-Collector came to the notice of the District Collector The Full Bench had observed that this reasoning was not correct The Full Bench clearly pointed out that the use of the expression in section 3 (3) of the Regulation "*in all cases and in the fullest manner*" was designed to confer upon the District Collector plenary powers of supervision and that far from intending to limit the power this expression intended to emphasise the unlimited nature of the power The Full Bench was of the clear view that there was no warrant whatsoever for the construction that once the orders of the Sub-Collector have been put into effect the District Collector will have no more power in relation to those orders as that would "*drastically curtail the power of the District Collector and emasculate the section*"

The same view was taken in a Bench decision of the Andhra Pradesh High Court in *Ramachandra Rao* v *Seshaia*[3] That decision dealt with a case under the Hereditary Village Offices Act The District Collector reversed the order of the Subordinate Collector after the time for preferring an appeal had lapsed The legality of this order of the District Collector was canvassed and the Bench took the view that even if the appeal to the District Collector was not maintainable as having been barred, there was nothing which would preclude the District Collector from interfering with the proceedings of the Assistant Sub-Collector and that that authority is derived from section 3 of Regulation VII of 1828. There too reliance was placed upon the observations of Satyanarayana Rao J , in *Venkatasubba Rao* v *Ananda Rao*[2], in support of the contention that once the order of the Revenue Divisional Officer had been carried into effect the jurisdiction of the Collector came to an end. But this argument was rejected. Reference may be made to the following observations at page 109

"With great respect to the learned Judge, we do not think we could share his view. The preamble to the regulation recites that the powers of Collectors are conferred on the Sub-Collectors and Assistant Collectors subject to revision and correction by the Collectors Section 3 of the Regulation lays down inunmistakable terms, that the proceedings of Subordinate and Assistant Collectors shall be subject to superintendence, control and revision of the Collector Thus, the Collector is invested with power *inter alia* to correct a mistake That being so, it cannot be postulated that when once the orders of a Sub-Collector or Assistant Collector have been carried into effect, the District Collector will have no authority to revise that order. To say this, will be to curtail the powers of the Collector to a large extent It may be that in particular cases, the exercise of such power after a lapse of a long period may work a great hardship to the parties. The District Collector normally may not revise orders of the Revenue Divisional Officer, if the party concerned has slept over the matter for a long period But that is not the same thing as laying down as a general proposition of law that in no case could a Collector use the powers of revision when once the order of the Subordinate Collector has been put into effect. The actual decision of Satyanarayana Rao, J ,

1. (1955) 2 M L.J 49: I.L R. (1955) Mad 460 at pages 477-478 (F B.)
2. (1951) 1 M L J 410
3. (1957) 2 An W.R 106 I.L R. (1956) A.P 1101.

may be justified because more than five years had lapsed after the order of the Revenue Divisional Officer was made

The same notion was expressed by a Full Bench of the Madras High Court in *Nagarathnammal* v. *Ibrahim Sahib*[1]. Further when order is *prima facie* illegal not only the Collector is entitled to exercise that power, but it is his duty to correct it, even after it is carried into execution."

Our attention was also drawn to the Bench decision in *Sundaram Ayyangar* v. *Ramaswamy Ayyangar*[2] and the following observations at page 958

"The order under section 38 (3) of Act (II of 1864), was, however, passed in this case by the Deputy Collector, and when his order was confirmed by the District Collector it became a final order passed by the Collector within the meaning of section 38 (3) and neither he nor the District Collector had himself power under the Act to pass any further order. We cannot accept a further contention that the proviso clause of section 38 gives power to set aside a sale after it has been confirmed under the first part of the section The power given under that clause is one that must be exercised in lieu of the confirmation of sale."

The scope of the observations should not be divorced from the context in which they were made. In that case the Deputy Collector confirmed a revenue sale after dismissing an application under section 38 (1) of the Act Then the District Collector confirmed that order of the Deputy Collector The party aggrieved filed a revision petition before the Board of Revenue which in the exercise of its general powers of supervision directed the Collector to cancel the sale which was accordingly cancelled by him. The legality of the subsequent order passed by the District Collector was canvassed in a civil suit under section 59 of the Act. It was held the original order of confirmation should stand, and that the District Collector had no jurisdiction to pass the subsequent order, merely because the Board of Revenue directed him to do so. It is true that the power of the District Collector once he confirms the sale, whether acting as the original authority or exercising his powers of revision under Regulation VII of 1828, would come to an end and he cannot go on varying his own orders from time to time This case is not of much relevance to the instant case in which the question is whether the District Collector can intervene after the Deputy Collector has confirmed the sale For all these reasons it has to be held that the District Collector can set aside a revenue sale under section 38 (3) proviso read with Regulation VII of 1828, at any time so long as he himself has not passed any final order We have already adverted to the considerations which he should take into account when he exercises the discretion as the ultimate revising authority.

Writ Petition No 1027 *of* 1963.—The point raised in this case is whether the District Revenue Officer has jurisdiction under Regulation VII of 1828, to revise the order of the Revenue Divisional Officer, who suspended a village headman for a period of one year from which no appeal was preferred by the village headman concerned under section 23 of the Madras Act III of 1895 The argument is that so far as the herediatry village Officers are concerned, the proceedings of the subordinate Officers (Sub-Collector, Deputy Collector and Assistant Collector) could be interfered with only in the manner provided under section 23 of the Act either by the District Collector or by the Board of Revenue and if the order passed by the Subordinate Officer is not covered by the provision under section 23 that order itself is final and that neither the District Collector, nor the Board can interfere with an order passed by the Subordinate Officer It is urged that Madras Act III of 1895, is a self-contained, exhaustive enactment dealing with appointment of hereditary village officers, their emoluments, disciplinary jurisdiction over them and the punishments to be imposed with regard to their misconduct, that the powers of the subordinate officers, the District Collector and the Board of Revenue are all to be found

1. (1955) 2 M L J 49 : I L R. 1955 Mad. 460.
2. (1918) I L R 41 Mad 955 : 35 M L J. 177

only from the provisions of this Act, and that the District Collector cannot exercise any power or jurisdiction to interfere with the order of the subordinate Officer outside the provisions of this Act There is no residuary power continuing to inhere in the District Collector after this Act came into force. It is, therefore, urged that if in respect of an order of suspension passed by the subordinate Officer no appeal is preferred to the District Collector under section 23, that order becomes final and the District Collector has no revisional jurisdiction under Regulation VII of 1828. In support of this, reliance was placed upon some observations in the Full Bench *Nagarathnammal* v. *Ibrahim Sahib*[1] We see no warrant whatsoever for this extreme contention either in the scheme or in the provisions of the Act or the reasonings, in the Full Bench decision On the other hand, we notice that the Full Bench while specifically dealing with this aspect has clearly laid down that despite the provision for a right of appeal under section 23, the District Collector will continue to have his powers of revision under Regulation (VII of 1828) and that there is no inconsistency between Act III of 1895 and Madras Regulation VII of 1828.

Some argument was advanced by Counsel appearing on both sides in an attempt to determine in what context the word Collector is used in this enactment, and our attention was also drawn to various Madras Regulations and enactments to find out whether the word Collector signifies only a District Collector or a District Revenue Officer or would include a Sub-Collector, a Deputy Collector and an Assistant Collector. No decisive light is thrown by any of those enactments or even the definition of Collector and District Collector in the Madras General Clauses Act I of 1891. It must be borne in mind that section 3 of Regulation VII of 1828, provides that the subordinate, Deputy or Assistant Collector shall *ex-officio* have authority to exercise within the division under his charge all the powers conferred upon the Collectors under the law then in force or to be enacted in future This statutory conferment of the power is subject to the important condition that there should be nothing to the contrary expressly declared in such enactment. This condition *something expressly to the contrary* (in the legislations in question) may be the entirety of the Act (meaning thereby this *ex-officio* power cannot be availed of by the subordinate officers in respect of any of the provisions of the Act) or in respect of some of the provisions of the enactment meaning thereby in certain circumstances subject to certain conditions the subordinate officer *ex-officio* can exercise the powers of the District Collector, but in certain cases he will have no such *ex-officio* powers So far as Madras Act III of 1895 is concerned, it cannot be disputed that the subordinate officers can exercise *ex-officio* powers under the Regulation The word Collector in section 7 which deals with disciplinary jurisdiction would mean the District Collector or the subordinate officers by reason of Regulation VI of 1828. There is nothing in section 7 to the contrary to exclude the applicability of section 3 of Regulation VII ; similarly in sections 9 and 10. In other words both in the matter of disciplinary jurisdiction and in the matter of appointment and filling up vacancies and appointment of deputies, the Collector as well as the subordinate officers will have concurrent jurisdiction. Suits for recovery of offices and emoluments and for registry as heir can also be filed under section 13 either before the District Collector or his subordinates Section 15 confers upon the District Collector the power to transfer any suit on the file of the subordinate officer to his own file or from the file of one such officer to that of another or even to the file of an Assistant or a Deputy Collector not in charge of a division for disposal From this section it is clear that there is a clear indication to the contrary that the power of the District Collector of withdrawal and transfer cannot be exercised by the Assistant or the Deputy Collector. If section 15 had been worded merely conferring the power of withdrawal and transfer on the *collector* it might mean that under section 3 of Regulation VII the Subordinate Collector also will have a similar *ex-officio* power . It is only to delimit the power of the Assistant or the Deputy Collector and to confer the power solely upon the District Collector that section 15 has been so worded.

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1. I.L.R. (1955) Mad. 460 (F.B.) : (1955) 2 M.L.J. 49.

When we come to sections 23 and 24 the position is made quite clear The word *Collector* in section 23 can mean only the subordinate officer; *i e*, the Assistant, Sub or Deputy Collector When the order under section 6 or section 7 of the decision rendered in a suit under section 13 is by a subordinate officer though the expression used is the *Collector* a statutory right of appeal is given to the District Collector. But if the original authority which passed the order is the District Collector himself a statutory right of appeal is given to the Board of Revenue within a period of three months, and the decision of the Collector on appeal, where he acts as the appellate authority, and that of the Board of Revenue, where it acts as the appellate authority is made final There is the further proviso to section 23 in respect of the offices of head of the village or the village accountant, providing a further (second) appeal to the Board of Revenue against the decision of the Collector in the exercise of appellate jurisidction in suits preferred under section 13 or concerning the dismissal or removal of such village officers. The significance of this proviso is that in certain matters the decision of the District Collector as appellate authority is final while in certain matters his decision as an appellate authority is subject to a further right of appeal to the Board of Revenue The appeal that is provided to the Collector under section 23 (2) from an order passed by a Tahsildar or a Deputy Tahsildar could be entertained and disposed of by the Sub-Collector by virtue of Regulation VII, because there is nothing in section 23 (2) expressly to the contrary to signify that the word *Collector* in section 23 (2) is used only to denote a District Collector and would not take in a Sub or an Assistant Collector Under section 24, just like section 23, we find reference to Collector, District Collector and the Board of Revenue The Collector in the context of section 24 is used to denote the Sub or Assistant Collector exercising *ex-officio* powers under Regulation VII This section 24 provides for the anomalous situation in which the Sub-Collector who *ex officio* exercised the powers as Collector under the Regulation happens to become the Collector of the entire District, and in such a situation there is no point in providing an appeal to himself against his own decision and, therefore, the provision is made that the appeal shall be disposed of by the Board of Revenue From this analysis it will be seen that no rigid or uniform rule can be laid down as to when the use of the word *Collector* in any statute would include both the District Collector and his subordinates and when it will exclude the latter completely, and the whole thing would depend upon the scheme of the Act and the nature and the purpose of the particular provision. In the instant case it is undisputed that the Assistant, Deputy or Sub-Collector can pass the order of suspension under section 7

We are unable to agree that the machinery for the right of an appeal in section 23 will have the effect of extinguishing the revisional power of the District Collector under Regulation VII of 1828. The provision for an appeal is for an entirely different purpose, namely, a statutory right of appeal to the aggrieved party. The power of revision and superintendence is a different power altogether, and that is vested in the District Collector with a view to ensure and maintain the efficiency, purity, morale and the discipline amongst the subordinate revenue officials Both the powers can co-exist and there is nothing so inherently incompatible in the two powers as to make one hold that the existence of the one necessarily means the supersession of the other. The result of accepting such an extreme contention is that in various matters concerning revenue officials the decision of the sub-Collector would become final virtually making him the head of the district. Take for instance the very case in the writ petition. If the charge of misappropriation is proved, it will be absurd to hold that the District Collector cannot take a different view from that of the Sub-Collector as to the nature of the punishment to be imposed If the punishment imposed is light the party aggrieved may be quite prepared to suffer the punishment and will not care to prefer an appeal. But the interests of the State may demand that a more deterrent punishment, sometimes even dismissal or removal from service, may be called for It is impossible to accept the contention that because a statutory right of appeal to the aggrieved party is provided, the paramount interests of the State should suffer, the Collector having no power of superintendence and

revision The conferment of a right of appeal to the party aggrieved to the higher authority, at the same time reserving a *suo motu* power of revision in the higher authority is a quite known and familiar conception. For instance several enactments on taxation combine both the remedies, the only condition being that the *suo motu* power of revision is not exercised till the time for preferring the appeal had expired or till the appeal is disposed of on merits Such an over riding power of revision is conferred to provide and deal with situations other than the interests of the party affected while administering the particular enactment. All the decisions, both of this Court as well as of the Andhra Pradesh High Court have uniformly taken the view that the District Collector can exercise the powers of revision under Regulation VII in respect of proceedings under Act III of 1895

The first decision to be referred to is the Bench decision of this Court in *Srinivasa Aiyangar* v. *Jagannatha Aiyangar*[1]. In that case the Revenue Divisional Officer made a permanent appointment of village munsif under section 10 (3) after negativing the claims of a minor to the vacancy. On behalf of the minor an appeal was preferred to the District Collector purporting to be under section 23 of the Act and the Collector under the erroneous impression that an appeal lay, set aside the order of the Revenue Divisional Officer and upheld the claim of the minor to the office. A suit was filed to set aside this order of the District Collector. The Bench held that there was no conflict between Regulation VII and Madras Act III of 1895 and the right to a suit under section 13 under the Act was not in any way inconsistent with the continuance of the power of superintendence, control and revision given to the District Collector under Regulation VII In the Bench judgment the crucial aspect was emphasised that it was the Regulation which conferred the *ex-officio* powers upon the Revenue Divisional Officers and that that very Regulation has reserved the power of revision in the District Collector. In a later decision, *Seshagiri Sarma* v. *State of Madras*[2], the Bench dealt with the case of appointment of a deputy under section 10 (5) of the Act On appeal to the District Collector the order of the Revenue Divisional Officer was set aside The aggrieved party took up the matter to the Board of Revenue and failing there filed a petition before the Government, which set aside the order of the District Collector An application was filed in the High Court for the issue of a writ of *certiorari*, Rajamannar, C J., delivering the judgment on behalf of the Bench held that there was no provision in the Act conferring any power on the Government to interfere with the orders of subordinate revenue authorities entrusted with specific powers under the provisions of the Act, and that in the instant case the Board of Revenue itself had no power to interfere with the order passed by the District Collector It was also observed that the power of the District Collector under section 10 (5) is exercised by the Revenue Divisional Officer because of Madras Regulation VII of 1828, and that under section 3 (3), the proceedings of the Assistant Collectors are made subject in all cases and in the fullest manner to the superintendence, control and revision of the District Collector. This decision is clear authority for the position that even though there is no right of appeal under section 23, the District Collector will have powers of revision under the Regulation.

In *Nagarathnammal* v. *Ibrahim Sahib*[3], the question arose whether the Board of Revenue has any jurisdiction to interfere to set aside the order of the Collector. That was also a case of the appointment of a deputy under section 10 (5) of the Act, in respect of which there is no right of appeal But the District Collector, exercising his revisional powers under Regulation VII of 1828, set aside the order of the Revenue Divisional Officer. It is in that context that Balakrishna Ayyar, J., delivering the judgment of the Full Bench made some observations at pages 469 and 474 that neither the Revenue Divisional Officer nor the District Collector nor the Board of Revenue can touch them (interfere with the rights of village officers) except in the manner that the statute permits, and that the rights and powers conferred and the obligations imposed by the statute must be worked out within the statutory frame work. These

1. (1938) 2 M L J. 488
2 (1952) 2 M.L J. 462
3. I.L.R. (1955) Mad. 460 : (1955) 2 M L J 49.

observations should not be torn from their context. But so far as the precise question, the right of revision of the District Collector, is concerned, there was pointed reference with express approval to the Bench judgment *Srinivasa Aiyangar* v. *Jagannatha Aiyangar*[1], referred to earlier. At page 474 Balakrishna Ayyar, J., formulated the question in these terms :

> " In respect of an appointment made under section 10 (5) neither a right of appeal nor a right of revision is provided for. The order of the District Collector cannot therefore be interfered with by any higher authority *The question may be asked has the District Collector power to interfere with an order passed by the Divisional Officer,* i.e., *the Collector under section* 10 (5)."

This is followed by the discussion about the reasoning in *Srinivasa Aiyangar* v. *Jagannatha Aiyangar*[1] In the Full Bench decision there is also reference to *Seshagiri Sarma* v. *State of Madras*[2], and the following observation,

> " ' If no appeal is provided for but only a right of revision then that remedy must be sought in aid ' again emphasises that the Full Bench has approved the view taken in *Seshagiri Sarma* v *State of Madras*[2], that under the Madrs Regulation the Collector will continue to have powers of revision "

In a series of decisions in the Andhra Pradesh High Court the same view has been taken (while dealing with the provisions of the Madras Act III of 1895) following the decisions of this Court referred to earlier Reference was alrady made to the decision in *Ramachandra Rao* v *Seshiah*[3], in which the Bench had held that even though the time for preferring an appeal had expired, the Collector can exercise the powers of revision under the Regulation

In *Prabhakara Rao* v *District Collector, Nellore*[4], an order of appointment of a deputy passed by the District Collector setting aside the order of the Revenue Divisional Officer was upheld following *Seshagiri Sarma* v *State of Madras*[2], on the ground that the Revenue Divisional Officer was exercising the powers only under section 3 of Regulation VII and that his decision was, therefore, subject to the revisional jurisdiction of the District Collector, expressly reserved in the same section It was observed that the Revenue Divisional Officer passed the order standing in the *shoes of the Collector and that it was necessarily subject to review by the District Collector under the Regulation.* This decision of Bhimasankaram, J , in the above case has been affirmed by the Bench of the Andhra Pradesh High Court in Writ Appeal No 1909 of 1958.

The same view was reiterated in another decision in the same volume, *Krishnayya* v *Collector of Kistna*[5] That case also related to the appointment of a deputy under section 10 (5), and the District Collector set aside the order of the Revenue Divisional Officer in an appeal preferred to him The argument that the District Collector has no jurisdiction because no right of appeal was provided in respect of orders under section 10 (5) was rejected on the ground that the District Collector had jurisdiction to interfere and set aside the order of the Revenue Divisional Officer under Regulation VII of 1828 The decisions of the Madras High Court referred to earlier were followed The same view was reiterated in the Bench decision in *Satyanarayna* v *Collector, West Godawari*[6], in which it was held that though the Collector has no appellate jurisdiction against the order of the Revenue Divisional Officer in the matter of the appointment of a deputy under section 10 (5), the Collector has, nevertheless, ample authority to revise the orders of the subordinates in the exercise of the powers conferred by the Madras Regulation The argument was advanced that the view taken by the Bench in *Seshagiri Sarma* v. *State of Madras*[2], must be held to have been overruled by the observations in *Nagarathnammal* v *Ibrahim Sahib*[7]. But this argument was not accepted The Bench pointed out that the Full Bench

1. (1938) 2 M L J 488
2. (1952) 2 M L J 462
3. (1957) 2 An W R 106 : I L R. 1956 A.P. 1101.
4. (1958) 1 An W R 164.
5. (1958) 1 An W R. 287
6. (1960) 2 An W R. 109
7. I L R. (1955, Mad. 460 . (1955) 2 M L J. 49

far from throwing any doubt upon the correctness of the view taken in *Seshagiri Sarma* v. *State of Madras*[1], completely approved of the view taken therein

We may also refer to another decision, *Prahalada Dolai* v *Board of Revenue*[2], in which referring to some of the earlier decisions, referred to already, it was held that even though there is no right of appeal a revision would lie to the District Collector under Regulation VII of 1828. In view of this uniform course of decisions we have no hesitation in holding that section 23 of the Act cannot be so interpreted as to have the effect of extinguishing the power of revision of the District Collector under Madras Regulation VII.

Writ Petition No 1027 *of* 1963 :—The question next arises as to the appropriate relief to be granted in this writ petition Following *Nagarathnammal* v. *Ibrahim Sahib*[3], it has to be held that the Revenue Board has no power of revision in respect of the order passed by the District Revenue Officer under Regulation VII of 1828 At the same time the order of the District Revenue Officer cannot be allowed to stand as several irregularities vitiate the entire proceedings The charges are incomplete The charges should furnish the details as to the date of collection, the dates of remittance so that the delinquent village headman would have adequate opportunity to offer his explanation. The order of the District Revenue Officer also shows that he has overlooked the fact that these proceedings are vitiated in the manner stated above The result is the order of the District Revenue Officer and that of the Board of Revenue are quashed and the matter will go back to the District Revenue Officer for disposal according to law and in the light of the observations contained in this judgment In the concluding portion of the affidavit filed in support of the writ petition the petitioner has explained that as the order of the District Revenue Officer became merged in the order of the Board of Revenue he could not ask for the issue of a writ to quash the order of the District Revenue Officer even though according to the petitioner his principal complaint is against the District Revenue Officer. It is because of this we are of the view that the ends of justice require that the order of the District Revenue Officer should also be quashed

Writ Petition No. 1225 *of* 1963:—In this matter even though we have upheld the jurisdiction and power of the District Collector Mr V K Thiruvenkatachari complains that the District Collector ought not to have set aside the sale in respect of the entirety of the property but should have confined the order to the extent of ·91 cents in old Pattas Nos. 11 and 18, belonging to the second respondent He urges that when the defaulter has not cared to prefer any appeal, there was no justification to set aside the entire sale and that relief should have been granted only in respect of 91 cents , and that the interests of the State do not require such an order. *Prima facie* we see great force in this contention But we do not want to express any final opinion for the following reasons.

As the order of the District Collector has set aside the sale in its entirety, it cannot be modified in this writ proceedings without the defaulter being made a party to the writ proceeding and without hearing his objections

Under the circumstances we think the proper course will be to send back the matter before the learned Judge who referred the matter to the Full Bench, so that the petitioner herein will take appropriate steps to implead the defaulter as a party-respondent to the writ petition and then the petition will be disposed of in accordance with law after hearing the objections of the defaulter.

V K *Order accordingly*

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1. (1952) 2 M L J 462
2. (1961) 1 An. W R 174.
3. I.L.R (1955) Mad 460 : (1955) 2 M L J. 49.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE K VEERASWAMI AND MR JUSTICE T RAMAPRASADA RAO

Muthu Gounder . *Petitioner* *

v.

The Government of Madras, represented by its Secretary, Home Department, and another .. *Respondents.*

Land Acquisition Act (I of 1894), *sections* 4 (1), 5-A, 6, 9, 17 (1), (2) *and* (4)—*Invoking emergency provisions—Whether justiciable—Arbitrary, capricious or* mala fide *exercise of power—Court's power to examine—Existence or urgency depends upon facts in each case—Specification in section* 4 (1) *notification whether urgency is under section* 17 (1), *or* (2)—*Not necessary*

If emergency exists the State would be justified in invoking section 17 (4). It is apparent from section 4 (1), section 5-*A* and section 17 (1), (2) and (4) that the effect of the application of section 17 (4) would be to dispense with the necessity for an enquiry under section 5-A Even in the case of emergency, possession before an award is made can only be taken after the issue of section 9 (1) notice An award also could follow only after proceedings under section 9 The dispensation of an enquiry under section 5-A can mean only avoidance of the delay in waiting for objections and considering the same and making a report thereon and the Government finally deciding to make a declaration under section 6 (1) Such a delay may roughly extend to about a couple of months at the most, a little more or less. The question in each case for the Government to consider when it desires to invoke section 17 (4) would be whether facts and conditions exist or require that would not brook the delay which would be caused by applying section 5-*A*. A decision on that question will have to be taken on proper material and in an objective manner, neither capriciously nor whimsically. In no case the decision can be arbitrary The question of urgency is always for the Government to decide and will not ordinarily be justiciable But when the Court is called upon to see whether the power in invoking urgency provisions has been properly exercised, it has necessarily to examine whether the decision to invoke the provisions was based on material and was neither arbitrary nor capricious nor *mala fide*. This principle should invariably be followed when the urgency provisions are invoked and the Court is called upon to examine whether the power under section 17 (4) has been properly invoked

Whether there is urgency or not in order to invoke the urgency provisions of section 17 will depend upon the facts in each case and have to be specifically examined and in the light of which a decision should be taken and not with reference to a general decision that whenever house sites have got to be acquired, it should, as a matter of course, be treated as an urgent case for acquisition and the emergency provisions invoked If there were facts on which a fair and reasonable conclusion can be formed this Court will decline to interfere, though it may take a different view on the question of urgency But where *ex facie* the decision is arbitrary, as the facts cannot possibly furnish a basis for any conclusion to invoke the urgency provisions, this Court has to step in and declare the action to be illegal.

It is imperative that section 4 (1) notification should indicate if urgency provision was to be invoked It is not necessary for the State Government to go further and specify in section 4 (1) notification whether the urgency was under sub-section (1) or sub-section (2) It would be open to the State Government to specify the particular provision for urgency for the first time in section 6 declaration.

Held on facts, it is obvious that the Collector must have been weighed and influenced by the omnibus general direction of the Government that wherever there was a proposal to acquire land for house sites, it should be treated as urgent.

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* W.P. No. 1655 of 1964 27th March, 1967.

Such a direction of a general kind will on the face of it be arbitrary and if such a direction is taken as a guide and the Collector recommended invoking of urgency provisions and the Government thereupon applied the urgency provisions, the validity of this action can hardly be supported as being in compliance with the terms of section 17 (1) read with (4) The application of the emergency provisions was not warranted and was not a fair and reasonable exercise of the power under section 17

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* or other appropriate writ, order or direction directing the respondents to forbear from taking any proceedings pursuant to the notification Memo. No 61759/HWIV/63-10, Home, dated 23rd March, 1964, of the State Government and published in the Fort St George Gazette, dated 17th June, 1964 in so far as the petitioner's property, namely, S Nos. 400/13 and 400/14-A in Konnaiyar in Tiruchengode taluk is concerned.

V. Thyagarajan, M. A. Rajagopalan and *T. Audiseshan*, for Petitioner.

J. Kanakaraj for Government Pleader (*G. Ramanujam*), for Respondents.

The Order of the Court was made by

Veeraswami, J.—The petition under Article 226 of the Constitution is to restrain the respondents from taking possession of land of an extent of 58 cents comprised in S. No. 400/13 and another extent of 52 cents bearing S No. 400/14-A under the provisions of the Land Acquisition Act. The grounds of the petitioner are that the State was not justified in invoking the urgency provisions in the Land Acquisition Act and there was failure to specify in the notification under section 4 (1) whether the urgency was invoked under sub-section (1) or sub-section (2) of section 17. As early as 20th December, 1961 the Collector made an inspection of the site but it is said that his in pection notes were dated only 20th February, 1963 On 12th June, 1963, a provisional conclusion was reached to acquire the lands, the public purpose being to provide house-sites for Harijans in the village. The notification under section 4 (1) was made ready on 23rd March, 1964, and it was actually published in the Fort St. George Gazette, on 17th June, 1964. This notification stated that the lands specified in the schedule thereto were needed for a public purpose, to wit, for the provision of house-sites for Harijans and that under sub-section (4) of section 17, the Governor directed that, in view of the urgency of the case, the provisions of section 5-*A* should not be applied This was followed by a declaration, dated 2nd September, 1964, under section 6, in which reference to section 17 (1) was made as the provision under which emergency existed.

It is contended that *ex facie* there was and there could be no emergency to invoke section 17 (1) or (2) The purpose of the acquisition, as we mentioned, was to provide sites for houses for Harijans. If emergency exists the State would be justified in invoking section 17 (4). But what kind of urgency is contemplated under section 17 that will justify its application has to be examined It is apparent from section 4 (1), section 5-*A* and section 17 (1), (2) and (4) that the effect of the application of section 17 (4) would be to dispense with the necessity for an enquiry under section 5-*A*. Even in case of emergency, possession before an award is made can only be taken after issue of section 9 (1) notice If the provision applied is sub-section (1) of section 17, possession could be taken on the expiration of 15 days from publication of the notice mentioned in section 9 (1). But if it is sub-section (2) of section 17 that is invoked, possession could be taken immediately after the publication of the notice mentioned in sub-section (1) of section 9 An award also could follow only after proceedings under section 9 Section 5-*A* is to the effect that within thirty days after the issue of the notification under section 4 (1), objections to the acquisition of the land proposed to be acquired could be made by any person interested in such land and notified under section 4 (1) The scope of the enquiry would be as to whether there is a public purpose and in connection therewith there is necessity to acquire more or less extent of the land notified under section 4 (1). Possibly some

time may be consumed in considering the objections after their receipt and in making a report on the basis of which and upon a consideration of which the Government declaration under section 6 (1) will follow The dispensation of an enquiry under section 5-*A* can, therefore, mean only avoidance of the delay in waiting for objections and considering the same and making a report thereon and the Government finally deciding to make a declaration under section 6 (1). Such a delay may roughly extend to about a couple of months at the most, a little more or less The question in each case for the Government to consider when it desires to invoke section 17 (4) would be whether facts and conditions exist or require that would not brook the delay which would be caused by applying section 5-*A* A decision on that question will have to be taken on proper material and in an objective manner, neither capriciously nor whimsically In no case the decision can be arbitrary. The question of urgency, of course, is always for the Government to decide and will not ordinarily be justiciable. But when the Court is called upon to see whether the power in invoking urgency provisions has been properly exercised, it has necessarily to examine whether the decision to invoke the provisions was based on material and was neither arbitrary nor capricious nor *mala fide* That proposition was laid down by one of us in *Periyathambi* v. *Special Tahsildar*[1] and we think that this principle should invariably be followed when the urgency provisions are invoked and the Court is called upon to examine whether the power under section 17 (4) has been properly invoked.

So far as we are able to find from the records of the acquisition sent up to this Court in obedience to the rule *nisi*, on a requisition from the State Government the Collector of Salem made a report, dated 3rd February, 1964 which is :

> "The Harijan colony is congested. The houseless families are suffering much for want of sufficient accommodation. They should be given immediate relief in view of the unhygienic condition of their living. Therefore the enquiry under section 5-*A* may be dispensed with in this case "

The Collector did not stop there In his communication he made it clear why he thought that he should take that view. He said :

> ' Further, the Government in their Memo. No. 50721/A H W. IV/63, dated 17th July, 1963 have specifically ordered that in all acquisition proposals for house sites etc., the provisions of urgency clause should be invoked."

It is obvious that the Collector must have been, as in fact he indicates in his communication, weighed and influenced by the omnibus general direction of the Government that wherever there was a proposal to acquire land for house sites, it should be treated as urgent. It is hardly necessary to say that such a direction of a general kind will on the face of it be arbitrary and if such a direction is taken as a guide and the Collector recommended invoking of urgency provisions and the Government thereupon applied the urgency provisions, the validity of this action can hardly be supported as being in compliance with the terms of section 17 (1) read with (4).

Whether there is urgency or not in order to invoke the urgency provisions of section 17 will depend upon the facts in each case and have to be specifically examined and in the light of which a decision should be taken and not with reference to general decision that wherever house sites have got to be acquired, it should, as a matter of course, be treated as an urgent case for acquisition and the emergency provisions invoked. It is material to remember that the right of owners whose lands are proposed to be acquired to prefer their objections under section 5-*A* is a valuable right. Before a decision is taken by the Government for the purpose of section 6, the direction of the Legislature under section 5-*A* is that objections should be received within of course a prescribed time from such owners and the same be considered after giving them an opportunity of being heard either in person or by pleader. In such an enquiry it would be possible for the owners to show that there

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1 I L R (1965) 2 Mad 416

was no public purpose, or that there was no necessity to acquire the proposed land, or that it would be proper and desirable to resort to acquisition of some other land and so on Could it be said in the present case that the acquisition could not brook the delay that would be caused by applying section 5-A ? If there were facts on which a fair and reasonable conclusion can be formed this Court will decline to interfere, though it may take a different view on the question of urgency. But where as we said *ex facie* the decision is arbitrary, as the facts cannot possibly furnish a basis for any conclusion to invoke the urgency provisions, this Court has to step in and declare the action to be illegal. We have no doubt that in this case the application of the emergency provisions was not warranted and was not a fair and reasonable exercise of the power under section 17.

The other point for the petitioner is that the State Government failed to specify in section 4 (1) notification whether the urgency invoked was under sub-section (1) or sub-section (2) of section 17 On the view we have taken on the first point, it is unnecessary to decide this question Even so, we may express our view that it is imperative that section 4 (1) notification should indicate if urgency provision was to be invoked. But in the case the notification did mention section 17 (4). We do not, however, think it necessary for the State Government to go further and specify in the section 4 (1) notification whether the urgency was under sub-section (1) or sub-section (2). It would be open to the State Government to specify the particular provision for urgency for the first time in section 6 declaration. We do not, therefore, see much force in the second point.

The petition is allowed with costs. The result is that the proceedings after the stage of the notification under section 4 (1) will stand quashed

S.V.J. ——— *Petition allowed; proceedings after section 4 (1), notification quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE K. SRINIVASAN AND MR JUSTICE R SADASIVAM.

Kanni .. *Petitioner* *

v.

Viswanatha Chettiar and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 44, *rule* 1 (2)—*Scope—Application for leave to appeal* in forma pauperis—*Court issuing notice to respondent without rejecting the application—If can, after hearing the respondent, dismiss the application under rule* 1 (2).

A Court which entertains an application for leave to appeal in *forma pauperis* under Order 44, rule 1 of the Civil Procedure Code and issues notice to the opposite party without rejecting it under Order 44, rule 1 (2), cannot, after hearing the opposite party, rescind its order to entertain the application on the ground that at that stage it is of the opinion that it ought to be rejected because the decree appealed from is not contrary to law, or to some usage having the force of law or is otherwise erroneous or unjust.

Somasundara Chettiar v *Arunachala Chettiar*, (1932) I L.R 55 Mad 982 · 63 M L J. 28 ; *Balaram* v. *Harikrishna*, A.I R. 1936 Mad. 661 and *Nagarattamma* v. *Nagayya*, A.I R. 1933 Mad 658 . 65 M L J. 362 Rel. on

The fact that the Court issues a notice to the respondent can normally only mean that the Court is unable to make up its mind, whether the decree sought to be appealed against, satisfies the requirements of Order 44, rule 1 (2), and if that is so, that would clearly be a confession that the matter is of sufficient substance to be heard after notice to the respondent, that is, that it merits admission. We assume

* C.R.P. No. 2310 of 1964. 8th August, 1967

that Judges perform the functions required of them under the law in proper form and the natural conclusion that one can draw from the fact that a notice has been issued to the respondent would therefore, be that, the appeal itself was intended to be admitted by the Judge. When that has been done the Judge can have no possible occasion for rescinding the order and have second thoughts on the question of the admissibility of the appeal

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court, Chingleput, in C M P No 435 of 1964 in S R No 2224 of 1964—O S No 41 of 1963, Sub-Court, Chingleput.

R. Sundaravaradan, for Petitioner

A Seshachari and *R. Janardhana Rao*, for Respondents

When the Civil Revision Petition was first heard by him the following Order was made by

*Ramaprasada Rao, J.**—This Civil Revision Petition is directed against the order of the District Judge, Chingleput in C M P No 435 of 1964 in S R No 2224 of 1964 An application was filed under Order 44, rule 1, read with section 151, Civil Procedure Code, praying that the petitioner be directed to file an appeal *in forma pauperis* against the decree and judgment, dated 24th March, 1964 in O S No 41 of 1963 on the file of the Court of the Subordinate Judge, Chingleput The learned District Judge after perusing the papers on record, thought it fit to issue a notice to the respondent and after hearing the respondent dismissed the application This appears to be contrary to the established procedure, as such issuance of the notice was construed to mean that he satisfied himself that the decree was contrary to law or to some usage having the force of law or was otherwise erroneous or unjust within the meaning of Order 44, rule 1, Civil Procedure Code After issuing the notice, the respondent appeared before the learned Judge On hearing both the parties, the lower Court held as follows —

> " I have gone through the judgment and other material papers and I am satisfied that the case rested purely on facts. As such, I am of the opinion that the petitioner is not entitled to the permission sought for "

The main contention urged before me by the petitioner is that once the learned Judge issues notice to the respondent, he is precluded from reconsidering whether the decree was contrary to law or to some usage having the force of law or otherwise erroneous or unjust, as by issuing the preliminary notice to the respondent, he should be deemed to have come to the conclusion and that therefore he having exhausted his jurisdiction by subjectively deciding to admit the appeal, he cannot again reconsider the issue after notice to the respondent Of course, the learned Judge can hear the Government and satisfy himself whether the appellant is really a pauper or not. This aspect is not disputed before me.

The question, therefore, for determination is whether by issuing a notice to the respondent after perusal of the judgment and decree, the lower Court has exhausted its jurisdiction to reconsider the appeal on merits and find whether there is a question of law or an error apparent in the judgment and decree appealed against I shall now proceed to consider the decided cases on the point at issue

Order 44, rule 1, as it originally stood contained a proviso which is very similar to Order 44, rule 2, which was inserted by the Civil Procedure Code Amendment Act (LXVI of 1956) The *ratio decidendi* of the decisions pronounced under the earlier Order 44, rule 1, can therefore be applied to the material portion of the language, the spirit and intention of the proviso to old Order 44, rule 1, and the present Order 44, rule 2 are *in pari materia* I shall for convenience refer to the proviso to the earlier rule as the old rule and Order 44, rule 2 as the new rule Jenkins, C J in *Sakubai* v. *Genpat*[1] was of the opinion that the proviso "would pro

*2 December, 1966

1. (1904) I.L.R. 28 Bom. 451.

vide a safeguard against this if the Judge or Bench admitting a pauper appeal were to express and record very briefly the reasons for granting leave, so that the Bench before whom the appeal ultimately comes may have an assurance that the leave was properly given " The objective and subjective satisfaction of the old and the new rule is mandatory

Where however on perusing the judgment and decree, if the appellate Court issued notice in the prescribed form, as in the instant case, to the respondent, the question is whether the Court has the power in law to rescind its earlier order not to admit the appeal, after hearing the respondent The Allahabad, Patna, Lahore and Rangoon High Courts took the view that issuing a notice is no ground for holding that the Court has satisfied itself about the judgment being appealed against being erroneous, unjust or contrary to law—See *Powdhari* v. *Ram Samwati*[1], *Tilak Mahton* v. *Akhil Kishore*[2], *Maung Nein* v *Burma Electric Supply Co* [3] Though the High Court of Calcutta was of this view earlier, it has now taken a contrary view in *Shib Krishna* v. *Panchanan Ganguly*[4]

In so far as to our High Court is concerned the decisions are conflicting. Though I would have rested my decision on the ratio of the Bench decision reported in *Somasundara Chettiar* v *Arunachala Chettiar*[5], yet this decision which was referred to with approval by a learned single Judge of our High Court, was sought to be distinguished later by another learned Judge who differed from the view propounded in the Division Bench case I shall now refer to the catena of decisions under the old rule that if once notice is issued to the respondent, the respondent has no *locus standi* to urge at a later stage that the old rule is not satisfied

In *Somasundaram Chettiar* v *Arunachala Chettiar*[5], Ramesam and Madhavan Nair, JJ., observed as follows at pages 983 and 984

' Undoubtedly the practice of this Court has been for at least the last thirty-two years, during which period I have been in touch with it, not to hear the respondent on the question whether the decree of the Court below is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust as provided for in the proviso to Order 44, rule 1 I do not mean to say that a practice ought to be adhered to merely because it is longstanding, even though we now find it to be erroneous , but I think it may be said that a longstanding practice is *prima facie* proof that it is really correct . . "

In *Nagarattamma* v *Nagayya*[6], the principle laid down in the above case was not brought to its notice. But Curgenven held in very strong terms as follows at page 659

" The proviso itself requires that the Court shall reject the application unless upon a perusal of it and of the judgment and decree, it finds the conditions laid down are satisfied , and that means, I think and is always in practice taken to mean, that the very first step in dealing with such an application is to peruse the records and if necessary to reject the petition without issuing notice to any of the parties interested It is impossible to contend on the terms of the proviso that the Court was justified in issuing notice in order to make up its mind whether to reject the application "

In this case, the successor of the learned District Judge who gave notice finally dealt with the application In my opinion, this circumstance does not in any way militate against the main decision.

In *Balaram* v. *Harikrishna*[7], Beasley, C J , observed as follows at page 662

" It is not the practice, and has not been the practice, to hear the respondent upon this question That being so, what is implied by the issue of a notice ?

1. (1934) I L R. 57 All 440 (F B).
2. (1931) I L R 10 Pat 606 (F B)
3. A I R 1939 Rang 25
4. A.I.R. 1961 Cal. 346 (F B.).
5. (1932) I L R 55 Mad 982 63 M L J 28.
6. 65 M L J 362 A I R 1933 Mad 658
7. A.I R. 1936 Mad. 661.

What is implied and what has always been intended by such an order is that the respondent is to have an opportunity of showing cause why the applicant should not appeal as a pauper and nothing else I do not suggest—and Ramesam, J., does not do so either—that a Judge or Judges may not sometimes before deciding whether the case comes within the proviso to Order 44, rule 1, Civil Procedure Code, require the assistance of the respondent but such cases are ra e, and, unless the order directing notice to go is qualified by some observations showing that the respondent is to be heard on the question of law, the ordinary rule, as I understand it and everybody else understands it, is that the issue of notice means nothing more than that the question of pauperism is to be gone into, the Co rt being satisfied, that on the face of the record it does satisfy the requirements of the proviso to Order 44, rule 1 "

In this case *Somasundaram Chettiar* v *Arunachala Chettiar*[1] has been quoted with approval

I may also incidentally add that the above view taken by our learned Judges have been followed by a Division Bench of the Bombay High Court in *Abdul Majid* v. *Bhaurau*[2], and by a Full Bench of the Calcutta High Court in *Shib Krishna* v. *Panchanan Ganguli*[3]

As against the one line of thought which, according to me, appears to be be dutifully accepted by our Courts here and elsewhere, there are two decisions of our High Court which have taken a contrary view In *Suryanarayanamurthi* v. *Nagachandramouli*[4], Horwill, J , was of the opinion that the mere issue of the notice to the respondent would not preclude the Judge to rescind his order if he has not considered the question under Order 44, rule 1, (as it then was), but he adds (at page 499), that,

> " clearly an appeal should not be admitted until the Judge is satisfied that the decree of the Court appealed against is contrary to law or is otherwise erroneous or unjust".

In this case a reference is made to the decision of Curgenven, J , in *Nagarattamma* v. *Nagayya*[5]. Even so, in *Sundaram Iyer* v *Saminatha Pillai*[6], Ganapatia Pillai, J , observed as follows at page 421

> " I do not see any justification for this view from the language of Order 44, rule 1 (2). It is no doubt true that it is the duty of the Judge to satisfy himself on perusing the decree and the judgment that the decree is illegal or contrary to law, before making up his mind to issue a notice to the respondent But, if the learned Judge has committed an error in issuing notice without performing the duty imposed upon him under Order 44, rule 1 (2), I do not find any reason for holding that he had no jurisdiction to correct his own error "

In fact, the decision in *Somasundaram Chettiar* v *Arunachala Chettiar*[1] and *Surianarayanamurthi* v *Nagachandramouli*[4] were cited before him Ganapatia Pillai, J was of the opinion that there is no conflict between *Somasundaram Chettiar* v. *Arunachala Chettiar*[1] and *Suryanarayanamurthi* v. *Nagachandramouli*[4] But it is however conspicuous that the later decision in *Nagarattamma* v *Nagayya*[5] and *Balaram* v *Harikrishna*[7], which laid down as it were an absolute and unqualified principle was not referred to before the learned Judge

In my view, there is a conflict of judicial authority on the subject concerned. While one view is that issuance of a notice bars a further enquiry under the old and the new rule, another view which is equally emphatic is that it does not preclude the Court from rescinding its earlier view and reconsider the application for leave to appeal *in forma pauperis* on merits as well In such a set of conflicting views I am constrained, at the request of the Counsel appearing on both sides, to place the paper before my Lord, the Chief Justice, the following proposition to be referred to a Bench of this Court for final disposal

1 (1932) I L R 55 Mad 982 63 M L J 28
2 A I R 1959 Bom 67.
3. A I R 1961 Cal 346 F B)
4 (1936) 71 M L J. 497.
5 65 M L J 362 A I R 1933 Mad 658
6 (1962) 1 M L J 420
7 A I R 1936 Mad 661

"Whether the Court which entertains the application for leave to appeal *in forma pauperis* under Order 44, rule 1, and isues a notice in due form to the opposite party without rejecting it under Order 44, rule 1 (2) it can rescind its order to entertain the application on the ground that at that stage, it is of the opinion that it ought to be rejected because the decree is not contrary to law, or to some usage having the force of law or is otherwise erroneous or unjust."

[Pursuant to the aforesaid Order of Reference the petition coming on for hearing before a Bench (Srinivasan and Sadasivam, JJ) the Court delivered the following Judgment]

The Judgement of the Court was delivered by

Srinivasan, J.—Our learned brother Ramaprasada Rao, J, has thought it necessary to make a reference to a Bench for a decision upon the following question —

"Whether the Court which entertains the applications for leave to appeal *in forma pauperis* under Order 44, rule 1 and issues a notice in due form to the opposite party without rejecting it under Order 44, rule 1 (2), can rescind its order to entertain the application on the ground that at that stage, it is of the opinion that it ought to be rejected because the decree is not contrary to law, or to some usage having the force of law or is otherwise erroneous or unjust?"

The point involved appears to be simple and amply covered by authority which to our minds, is clearly expressed in the decisions to which we shall presently refer The learned District Judge, against whose order the civil revision petition has been taken, had the pauper appeal petition before him for admission He apparently thought it fit to issue notice to the respondent, not on the question of the pauperism of the appellant petitioner but on the question whether the decree sought to be appealed from was contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust After the appearance of the parties and presumably after hearing them the learned District Judge passed an order dismissing the application observing that there was no question of law in the case. He states :

"I have gone through the judgment and the other material papers, and I am satisfied that the case rested purely on facts As such I am of the opinion that the petitioner is not entitled to the permission sought for."

The matter accordingly comes before this Court for decision of the question of what may be described as one of jurisdiction, that is, whether after having issued notice to the respondent, the Court, before which the appeal memorandum is filed, can proceed to reject the application, not on the question of pauperism but for the reason that the decision is not contrary to law, or erroneous or unjust.

To our minds, Order 44, rule 1 (2) is perfectly clear and it does not appear to us to be capable of admitting any discussion upon what it expected of the Court before which the appeal memorandum is filed. It says thus

"The appellate Court after fixing a day for hearing the applicant or his pleader and hearing him accordingly if he appears on that day, and upon a perusal of the application and of the judgment and decree appealed from, shall reject the application, unless it sees reasons to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust"

The rule does not speak of the issue of a notice to the respondent nor is the respondent entitled under this rule to present any arguments even if he chooses to appear without notice For, if the respondent should so appear and be heard upon a petition, which has to be decided by the Court, it should be obvious that it would be really a hearing of the appeal upon the merits, as the respondent would certainly seek to support the judgment of the Court below. The rule accordingly directs that only the applicant or his pleader should be heard in order that he may make out a point which would justify the admission of the appeal and the appellate Court is also enjoined to decide whether, upon a perusal of the records, it appears that the

decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust The rule thus places an obligation squarely only upon the shoulders of the applicant and of the Court and no other party is permitted by the rule to intervene at this stage For as we have already pointed out, if the respondent should be heard, he would certainly be in the position of a person seeking to support the judgment of decree appealed from, that is, arguing the appeal virtually on its merits even before the admission of the appeal.

If so much is clear, we find ample authority for this position in several decisions of this Court. They have all been referred to by our learned brother, Ramaprasada Rao, J. The earliest is *Somasundaram Chettiar* v. *Arunachala Chettiar*[1]. What happened in that case was that at the time the appeal petition was posted for hearing under Order 44, rule 1 (2), the respondent to whom notice of enquiry into the pa perism alone had been issued, urged that he had a right to be heard upon the question whether te appeal petition itself should be admitted or not

Such a right in the respondent was expressly negatived by the learned Judges. They also pointed out that solely for the reason, that the notice was issued in the appropriate form under the Code it could not be interpreted in such a way as to enlarge the scope of rule 1 (3) of Order 44.

This decision has been followed in *Balaram* v. *Harikrishna*[2] In *Nagarattamma* v. *Nagayya*[3], another learned single Judge of this Court expressed himself in a like manner though the earlier decision in *Somasundaram Chettiar* v *Arunachala Chettiar*[1], does not appear to have been brought to his notice.

As those decisions cited above and noticed by our learned brother, Ramaprasada Rao, J., amply show, it has been the consistent practice of this Court, for several decades in the past, not to issue any notice to the respondent at the stage when the appeal petition *in forma pauperis* is heard for pauperism of admission.

Two judgments of single Judges of this Court referred to by our learned brother in the referring judgment, apparently took a slightly different view. In *Suryanarayanamurthi* v. *Nagachandramouli*[4], Horwill, J, thought that if the Court of appeal had not really considered the question under Order 44, rule 1 (2), the mere fact that notice to the respondent had been issued would not preclude it from proceeding to do so. But the learned Judge stated that an appeal should not be admitted under that provision until the Judge is satisfied that the decree of the Court appealed against is contrary to law or is otherwise erroneous or unjust. Clearly, the learned Judge interpreted the rule in the same manner as we have done in holding that it is the primary duty of the Judge to decide the question of admission of the appeal in the light of the rule.

In a later decision, *Sundaram Iyer* v. *Saminatha Pillai*[5], Ganapatia Pillai, J., while conceding that it is the duty of the Judge to satisfy himself that the decree is illegal or contrary to law before making up his mind to issue notice to the respondent, added :

> " But, if the learned Judge has committed an error in issuing notice without performing the duty imposed upon him under Order 44, rule 1 (2), I do not find any reason for holding that he had no jurisdiction to correct his own error."

What this decision appears to indicate is that if the Court in which the appeal is sought to be filed has not perused the records, but has nevertheless issued notice to the respondent, it would be open to that Court later to peruse the records and come to the requisite conclusion under that provision and reject the application, despite the issuance of notice to the respondent Assuming that this decision does not run counter to the line of cases we have referred to, it obviously hinges upon a peculiar feature, namely, that the Judge had by inadvertence issued notice to the respondent, and had not performed the duty required of him under Order 44, rule 1 (2). It does

1. (1932) 63 M L J 28 : I L R. 55 Mad. 982.
2. A I R 1936 Mad 661.
3. 65 M L J. 362 A.I R 1933 Mad 658
4. (1936) 71 M L J. 497
5. (1962) 1 M.L J 420.

not appear to us that this decision can be permitted to run against the trend of the earlier decisions, which have taken a categorical view in the matter

The fact that the Court issues a notice to the respondent can normally only mean that the Court is unable to make up its mind, on a perusal of the records, whether the decree sought to be appealed against, satisfies the requirements of Order 44, rule 1 (2) and if that is so, that would clearly be a confession by the learned appellate Judge that the matter is of sufficient substance to be heard after notice to the respondent, that is, that it merits admission We assume that Judges perform the functions required of them under the law in proper form and the natural conclusion that one can draw from the fact that a notice has been issued to the respondent would, therefore, be that the appeal itself was intended to be admitted by the Judge It seems to us, accordingly, that when that has been done, the Judge can have no possible occasion for rescinding the order and have second thoughts on the question of the admissibility of the appeal We, therefore, answer the question referred to us in the negative

(The petition then came up for hearing before Ramaprasada Rao, J.)

The Court made the following

ORDER* —The matter was dealt with by me earlier and as it appeared that there were conflicts of opinion, the matter was referred to a Division Bench, and the Division Bench has answered the reference, the question posed before them being

" Whether the Court which entertains the application for leave to appeal *in forma pauperis* under Order 44, rule 1, and issues a notice in due form to the opposite party without rejecting it under Order 44, rule 1 (2), can rescind its order to entertain the application on the ground that at that stage, it is of the opinion that it ought to be rejected because the decree is not contrary to law, or to some usage having the force of law or is otherwise erroneous or unjust "

The question was answered in the negative by the learned Judges constituting the Division Bench It therefore follows that the order of the lower Court in having reconsidered the application to file the appeal *in forma pauperis* is illegal and the resultant order therefore has to be set aside In this view, this Civil Revision Petition will have to be allowed.

Learned counsel for the respondents states that there was no enquiry regarding the pauperism of the appellant There is no sufficient material on record to come to a conclusion one way or the other on this question This matter ought to have been normally dealt with even in the initial stages While therefore rejecting the contention of the learned Counsel for the respondent which is taken before me for the first time, I direct that the appeal filed by the petitioners in the lower Court *in forma pauperis* may be taken on file and disposed of in accordance with law.

The Civil Revision Petition is allowed with no order as to costs.

V.K. *Petition allowed.*

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* 6th October, 1967

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE M NATESAN

The State of Madras, represented by the Chief Secretary to Government of Madras, Madras .. *Appellant**

v.

The Rohtas Industries Ltd, Dalmianagar, Shahabad District, Bihar State *Respondent*

Contract Act (IX of 1872), sections 73 and 176—Legal incidents of a pledge—Promisor pledging savings bank pass book as security for due performance of contract—Breach of contract by promisor—Promisee if can forfeit the deposit without proof of damages

Constitution of India (1950), Article 299—Requirements under—Could be found satisfied in correspondence relating to contract

The legal incidents of a pledge are well known Admittedly even a savings bank pass book may be pledged for the due performance of a promise In the case of a pledge, on default by the promisor, the pledgee's right is to sell the pledged thing for any amount that may be due The surplus would go to the promisor The pledged object cannot be forfeited by the pledgee The pledgee is given only a power of sale.

Where therefore, a certain sum in the shape of savings bank pass book is pledged with the promisee as security for the faithful performance of a contract by the promisor, there can be no forfeiture of the amount, on the breach of contract by the promisor, in the absence of a specific clause to that effect, which could not merely be implied The amount in such a case would be available only to satisfy any damages that may be suffered by the promissee on account of any default in the faithful performance of the contract by the promisor.

In order to satisfy the requirements of Article 299, of the Constitution it is not necessary that there should be drawn up a formal agreement as such If the requirements of Article 299 could be found satisfied in the correspondence relating to the contract, then that would be sufficient to satisfy the requirements of the Article.

In the instant case, however, the appellant is not able to point out anything in the correspondence to satisfy the requirements of Article 299 of the Constitution.

Appeal against the decree of the City Civil Court (Additional Judge), Madras, dated 29th January, 1963, in Appeal Suit No. 86 of 1961, preferred against the decree of the Court of the City Civil Court (IV Assistant Judge) of Madras in Original Suit No 1420 of 1958, dated 29th November, 1960.

The Government Pleader, for Appellant

K. R Venkatarama Sarma, for Respondent.

The Court delivered the following

JUDGMENT.—The State of Madras has preferred this Second Appeal from the judgment of the Additional Judge, City Civil Court, on appeal from the Judgment of the IV Assistant City Civil Judge, Madras, the decision on appeal going against the State

The suit was filed by the plaintiff, Rohtas Industries Ltd, against the State for the recovery of a sum of Rs 1,514 with interest and costs. The plaintiff, a limited company engaged in the manufacture of paper, cement etc at Dalmianagar in Bihar State, claimed under this action, return of a sum of Rs 1,000 deposited as security amount and a sum of Rs 300 deposited along with a tender which the plaintiff made in terms of the provisions as to the submission of the tender. The tender was for

*S A No 1332 of 1963. 19th September, 1967

the purchase and removal of waste paper accumulations in Government offices and press cutting accumulations in Government Press, Madras, and its branches for the year 1955-56. On 10th June, 1955, the Controller of Stationery and Printing, Madras, called for the tenders Clause 2 of the tender provided that the tenders must be accompanied by a deposit of Rs 300 which should be paid in the Reserve Bank of India and the relative chalan should be enclosed with the tender Clause 4, an important clause, in the tender notice provided that if a tenderer withdrew his tender before settlement, his tender deposit would be forfeited to Government Clause 5, equally important, said that in the case of unsuccessful tenderers, the tender deposit would be returned to them Clause 6, which has been the subject-matter of construction by the Courts below may better be set out fully. It runs thus

"The successful tenderer will be required to execute an agreement for the faithful performance of the contract within 7 days from the date on which the acceptance of his tender is intimated to him and to deposit a sum of Rs 1,000 in the shape of Post Office Savings Bank Pass Book as security deposit The amount should be pledged to the Controller of Stationery and Printing, Madras, for the faithful performance of the contract A sum of Rs 1-80 in cash towards stamp duty for the agreement to be executed will have to be paid by the contractor"

Under clause 8, the contractor will have to make his own arrangements to collect the waste paper accumulations in various Government offices in Madras State both in the city and mofussal within 15 days from the date of receipt of intimation from the officers concerned The cost of waste paper was payable to the officers from whose office the waste paper or the press cuttings were collected at the time of taking delivery. There is no dispute that the plaintiff became the successful tenderer and his tender was accepted by the Government Exhibit B-6, is the order of the Government wherein it is stated that the Controller of Stationery and Printing, who had called for tenders recommended to the Government, for acceptance, the tender of the plaintiff for the purchase and clearance of waste paper. The rates quoted are shown Clause 3, of this order, dated 18th October, 1955, provides *inter alia* .

"The company should pay in advance the entire cost of waste paper and press cuttings to the head of the concerned office before actual removal, together with the sales tax and also pay in addition to the Controller of Stationery and Printing, Madras, a security deposit of Rs 1,000 in respect of all Government offices".

The agreement, it is stated, was to be in force from 1st April, 1955 to 31st March, 1956 It is also an admitted fact that on the acceptance of his tender in terms of clause 6, the plaintiff provided the deposit of Rs. 1,000 and a sum of Rs. 1-80 in cash for stamp duty on the agreement to be executed. But the agreement was not executed despite repeated requests by the plaintiff It is seen from the judgments of the Courts below, that on several occasions, the plaintiff called upon the State, of course through the Controller of Stationery and Printing, to send the agreement referred to in clause 6, of Exhibit A-5, and that the reply was always to the effect that the matter was under consideration Under Exhibit A-50, dated 23rd December, 1955, the plaintiff wrote to the Controller of Stationery and Printing referring to the delay in sending a copy of the agreement and stating that the plaintiff did not know where it stood and what its obligations were under the contract In Exhibit A-52, dated 21st December, 1955, it is stated by the Controller that the draft agreement had been submitted to the Government for approval and that it would be sent in due course But it is common ground that no agreement eventually came to be executed. It is seen that the plaintiff had also been repeatedly requesting the Government to intimate the various offices wherefrom he could get these accumulations. Ultimately, nothing transpiring by his correspondence, on 6th January, 1956, the plaintiff withdrew his tender and refused to carry out any more work The plaintiff had removed certain quantity of waste paper, but there is no dispute that these were paid for. It is seen that it was after 6th January, 1956, the Government authorities began to intimate the plaintiff of the accumulations of stocks.

The Courts below took the view that there was a concluded contract between the parties and that the plaintiff had no justification for rescinding the contract on 6th January, 1956. Two grounds were relied upon by the plaintiff for rescinding the contract, (1) failure on the part of the Controller of Stationery and Printing to give the plaintiff a list of the offices from which it was required to clear the waste paper, and (2) failure to execute the agreement provided for in Exhibit A-5 in spite of repeated requests. So far as the first ground is concerned, I am in entire agreement with the Courts below that it is not a substantial ground for withdrawing from the contract. The second ground requires careful consideration.

The contention of the plaintiff has been that there was no valid contract between the parties and that, in those circumstances, he was entitled to a refund of the two sums of Rs. 300 and Rs. 1,000. The State conceded to the plaintiff's having refund of Rs. 300 the tender deposit. As regards the sum of Rs. 1,000, the State's contention was that it was entitled to forfeit it as there was breach of contract on the part of the plaintiff. The trial Court accepted this defence of the State and granted a decree in favour of the plaintiff for the sum of Rs. 300 in respect of which there was concession by the State. On appeal, the Additional Judge has decreed the claim of the plaintiff for this sum of Rs. 1,000 also. He would also uphold the validity of the contract between the plaintiff and the defendant. But in the learned Judge's view, the defendant would be entitled to appropriate the sum of Rs. 1,000, only to the extent the defendant had been damnified by the breach of contract by the plaintiff. He found that there was no proof of any damages suffered by the defendant. He, therefore, held that no deduction could be made from the security deposit or any adjustment made for damages and that the plaintiff was entitled to return of the entire amount of Rs. 1,000.

In this second appeal before me, it is contended for the State, that the learned Additional Judge erred in his view that an entirety of the amount of Rs. 1,000, could not be forfeited, having held that the breach of contract was not on the part of the defendant as alleged by the plaintiff but that it was the plaintiff who broke the contract. It is not the case of the State before me that they have sustained any damages. This has been found against. With reference to the present contentions of the State there are two aspects of the tender notice, Exhibit A-5, which have to be considered. First in regard to the sum of Rs. 300, the deposit that had to accompany any tender, there is specific provision for the forfeiture of the deposit to the Government if the tenderer withdrew the tender before settlement. There is also the provision that in the case of an unsuccessful tenderer, the tender deposit would be returned. Nothing is said in this agreement as to what should happen to this tender deposit if the contract proceeded forward and the tender was accepted. All that we find is provision for a further deposit of a sum of Rs. 1,000. This need not necessarily be by way of cash. So far as the tender deposit is concerned, the deposit is to be made in the Reserve Bank of India and the relative chalan sent with the tender. As regards the deposit of the sum of Rs. 1,000 for the faithful performance of the contract, it might be in the shape of Post Office Savings Bank Pass Book the amount is to be pledged to the Controller of Stationery and Printing, Madras, for the faithful performance of the contract. There is absolutely no provision for forfeiture of the amount and it is difficult to imply such a provision as the tender notice refers to the amount being pledged with the Controller. The legal incidents of a pledge are well known. Admittedly even a Savings Bank Pass Book may be pledged for the due performance of the promise. In the case of a pledge, on default by the promisor, the pledgee's right is to sell the pledged thing for any amount that may be due. The surplus would go to the promisor. The pledged object cannot be forfeited by the pledgee. The pledgee is given only a power of sale. In the present case, actual cash appears to have been deposited, but that cannot make any difference in principle for infering the true character and purpose of the deposit. Only there need be no sale on default to convert the pledged article into cash by sale, for appropriation towards money due on account of the default. The intention is clear; the amount is given as security for the faithful performance of the contract and would be available to satisfy

any damages that may be suffered by the State, in default of faithful performance of the contract. On my reading of this agreement, it would not be open to the State to forfeit the amount even if the State has not suffered any damages Though the subsequent correspondence may not be of any use in interpreting the agreement, the learned Additional Judge refers to a letter, Exhibit A-93, written by the Controller of Stationery and Printing, to the plaintiff wherein it is stated that the Government had sustained a loss of Rs 750, on account of the non-fulfilment of the contract by the plaintiff and that if the plaintiff failed to remit the sum of Rs 750 within a week, the tender deposit would be forfeited

Learned Counsel for the State would contend that a right to forfeit the amount on breach of the contract, could be implied As authority for the position, he refers me to a decision in *Mohd Dalil Khan* v *State of Andhra Pradesh*[1] In that case, the plaintiff, a contractor, entered into a contract with the Government for taking some construction work and deposited certain amount of earnest money and certain amounts as further security returnable upon the completion of the work The contract not having been completed within time, the Government cancelled the contract and forfeited the deposit. On the legality of the forfeiture being questioned, it was observed at page 220

" As discussed above, the earnest money and the further security deposit being a guarantee for the due performance of the contract, if the contract goes off due to the fault of the contractor, the Government in our opinion, would be entitled to forfeit the amount even in the absence of an express agreement In the instant case, the contract has not gone through and it was cancelled "

Learned Counsel argues on the basis of this judgment that in the circumstances of this case it could be inferred that the deposit could be forfeited. To see whether there is a right to forfeit, it is said, the nature of the deposit has to be examined. Learned Counsel contends that it is a deposit here for faithful performance of the contract. Mr M S Venkatarama Iyer, learned Counsel appearing for the plaintiff would distinguish this decision pointing out that there was provision for deposit of earnest money in that case and a further security was also treated as earnest Learned Counsel contends that in fact in the cited case the entire amount was regarded as earnest, the incidents of which money are well established My attention is drawn to the following observation of the learned Judge in that case

" From the above discussion, it follows that the deposit is a guarantee for the performance of the contract, and until the contract is performed the earnest money remains a security or earnest for the performance of the contract. The moment the contract is performed it becomes a part of the price or purchase money. But it is liable to be forfeited if the contract does not go through due to the fault of the contractor."

Here there is no question of any purchase price. The plaintiff has to pay every time he takes the waste paper from the office concerned It is merely a deposit made for the faithful performance of the contract It is referred to as being pledged, and the necessary inference cannot be brushed aside It is not contended that it is not returnable when the contract has been faithfully performed The submission in the circumstances, for the respondent, that the only possible inference is that this amount is ret ined by the State as against any damages that it may suffer by reason of any default on the part of the plaintiff appears to me to be sound In support of this argument, my attention was drawn to a passage in Indian Contract Act by Pollock and Mulla, 8th Edition, at page 499 The learned Editors remark .

" Monies are often deposited as security for the performance of a contract, without such monies being earnest money In such a case there may be a forfeiture clause or not. Where there is no forfeiture clause, the party committing

1. (1963) 1 An W R. 31 · A I R 1963 A P. 216

a breach of the contract is liable only to pay damages and is entitled to the return of the remainder of the monies deposited "

Two cases are cited under this proposition, *Mayson* v *Clonet*[1] and *Public Works Commissioner* v. *Hill*[2] It is admitted by Counsel that the proposition as such in so many words is not laid down in the judgments It may be that the learned Authors, evidently inferred that this must be the true position having regard to the discussion of general principles in those two cases

Mr. M. S. Venkatarama Iyer, learned Counsel for the plaintiff also referred to the decision in *Venkataperumal* v *Thirupuvanam Panchayat Board*[3] In that case, the plaintiff agreed to construct a bus stand for the defendant and subsequently deposited a sum of money with the defendant for the due performance of that contract within the time allowed. There was nothing to show that the amount of the deposit would be forfeited in case of the plaintiff's failure to perform the contract The plaintiff brought a suit for return of the deposit even though he failed to carry out the contract The learned Judge, Govinda Menon, J., after discussing the case-law relating to earnest money and *Desu Rattamma* v *Kakaraparthi Krishnamurthi*[4] observed ·

"From this decision it is clear that there should be an agreement of forfeiture in default, and, such a thing cannot be implied from the fact of mere failure to perform the contract It is clear fom the correspondence that there is no clause of forfeiture in case of failure to perform the contract Certainly if so advised the defendent is at liberty to file a suit for damages against the plaintiff for the non-performance of the contract But the fact that they have a remedy of filing a suit for specific performance or damages would not entitle them to keep in hand the money paid as advance without a clause of forfeiture "

This case comes nearest to the case now on hand. That was also a case where a deposit had been made for due performance of the contract by a contractor It was not a case of sale where earnest money was paid that when the contract went forward it become part of the price. The learned Judge says that there should be an agreement of forfeiture in default, and such an agreement could not be merely implied Having regard to all the circumstances of the case on hand I should prefer to follow the principle of this judgment in preference to the judgment in *Mohd Dalil Khan* v. *State of Andhra Pradesh*[5].

Mr. M. S. Venkatarama Iyer contends also that in fact there is no valid contract between the plaintiff and the State Learned Counsel refers to Article 299, of the Constitution of India and points out that admittedly no formal contract has been entered into between the parties The tender notice contemplates an agreement to be entered into between the parties. The plaintiff had deposited a sum of Rs. 1.80 towards stamp dutv for the agreement A successful tenderer is required to execute an agreement for the faithful performance of the contract and it is against this agreement that the deposit of Rs 1,000, in the shape of Post Office Savings Bank Pass Book has to be made The plaintiff had repeatedly asked the Controller of Stationery and Printing, to bring about the agreement On this part of the argument, Mr. Venkatarama Iyer drew my attention to a statement of the law in Indian Contract Act by Pollock and Mulla, 8th Edition, page 54. It is therein stated :

" Although there can be no contract without a complete acceptance of the proposal, it is not universally true that complete acceptance of the proposal makes a binding contract ; for one may agree to all the terms of a proposal, and yet decline to be bound until a formal agreement is signed, or some other act is done. This is really a case of acceptance with an added condition, but of such special importance as to call for separate mention "

Learned Counsel contends that here was a contract to be entered into with the State and if the contract does not comply with the requirements of Article 229 of the Consti-

1. L R (19?4) A C 980
2. L R (1906) A C 368
3. A.I.R 1955 Mad 717
4. (1927) M L J 40
5. (1963) An W R 31 A.I.R 1963 A P 216

tution, it might not be possible for the plaintiff, if the occasion required, to enforce it. Learned Counsel submits that therefore it was quite an essential prerequisite in the instant case for an enforceable contract to come into existence that there must be an agreement as contemplated in the tender notice. It is a condition precedent for a valid contract to come into existence that it must comply with the requirements of Article 299, of the Constitution My attention is drawn by learned Counsel to some of the cases in this regard. In *Bhikraj* v. *Union of India*[1] it is observed at page 119 :

> " It is in the interest of the public that the question whether a binding contarct has been made between the State and a private individual should not be left open to dispute and litigation ; and that is why the Legislature appears to have made a provision that the contract must be in writing and must on its face show that it is executed for and on behalf of the head of the State and in the manner prescribed .... It is true that in some cases, ha dship may result to a person not conversant with the law who enters into a contract in a form other than the one prescribed by law It also happens that the Government contracts are sometimes made in disregaid of the forms prescribed ; but that would not in our judgment be a ground for holding that departure from a provision which is mandatory and at the same time salutary may be permitted "

Learned Counsel appearing for the State submits that if the requirements of Article 229 of the Constitution could be found satisfied in the correspondence relating to the contract, then that would be sufficient to satisfy the requirement of the Article. True, that is so. A Division Bench of this Clourt in *Rajam* v *Indian Union*[2], states the position thus

> " It is, therefore, well settled now that, while the requirements of Article 299, whose terms are identical with those of section 175 (3), (of the Government of India Act), are mandatory and should be complied with in order that an agreement entered into by a private party with the Central or State Government in the exercise of their executive power be enforceable, it is not necessary that there should be drawn up a formal agreement as such, but there could be a valid contract entered into by correspondence provided the two requirements, pointed out by Supreme Court in *Karamshi Jethabai* v. *State of Bombay*[3] are complied with."

In *Karamshi Jethabai* v. *State of Bombay*[3], Subba Rao, J., as he then was of the Supreme Court, observed at page 999 ·

> " This section (section 175 (3) Government of India Act) laid down two conditions for the validity of such a contract, namely, (*i*) it should be expressed to be made by the Governor of the Province, and (*ii*) it should be executed on behalf of the Governor by such persons and in such manner as he might direct or authorise "

It was found in that case that the contract by correspondence did not satisfy the requirements. Learned Counsel for the State is not able to point out anything in the correspondence in this case to satisfy the two requirements of Article 299, of the Constitution. This point for the plaintiff, it cannot be said, is taken for the first time in this Court. It was manifestly and in specific terms taken at any rate before the learned Additional Judge The learned Judge dispcsed of the argument with a reasoning which the learned Counsel appearing for the State finds it difficult to even adopt The reasoning is so palpably untenable that it is better I set it out in his own language ·

> " I must also refer to an argument advanced by the learned Counsel for the plaintiff that there has been no valid contract between the parties inasmuch as the contract has not been entered into according to the provisions of the Constitution. I do not think that this argument can have any substance. If the plaintiff's agreement was with the Controller of Stationery and Printing, the plaintiff

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1. (1962) 2 S C J 479 . (1962) 2 S C R 880 251 at 254
A.I.R. 1962 S C 113.
2. I.L.R. (1966) Mad 44 : (1966) 2 M L J.
3. (1965) 2 S C J. 568 : (1964) 6 S.C.R. 984 : A I R 1964 S C 1714.

had no cause of action against the defendant which is the State Government Both parties therefore understood, rightly in my opinion, that it was the defendant who was the contracting party and that the Controller of Stationery was acting on behalf of the defendant. If it were otherwise, the plaintiff will have to be non-suited."

It is not necessary for me to comment on this reasoning of the learned Additional Judge It wholly misses the point; an answer is avoided Clearly there is no enforceable contract in this case If the contract goes, then on that ground, the plaintiff would be entitled to the return of the sum of Rs 1,000. It follows, therefore, there is no case for varying the decree of the Additional Judge, City Civil Court.

In the result the second appeal fails and is dismissed with costs No leave.

V.K. —————— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE T VENKATADRI

C. S. Peeran Sahib . *Appellant**

v

The State Wakf Board, represented by its Secretary, Madras *Respondent*

Wakf Act (XXXIX of 1954)*—Applicability of, to Wakf properties created before the Act —Scheme framed by civil Court prior to the Act—Muthavalli to submit accounts etc under the scheme—Wakf Board directing muthavalli to register Durga and submit accounts etc. to it—Whether muthavalli bound to comply—Effect of scheme decree after the Act.*

The Suit properties, being Wakf properties, will be covered by the Act, since the Act applies to all wakfs whether created before or after the commencement of the Act.

Once the statutory Act has come into force for the purpose of securing better administration and supervision of Wakf properties and it creates an obligation and enforces the performance in a specified manner, the general rule is that the performance cannot be enforced in any other manner The general superintendence of all wakfs vests in the Board and the Board's duty is to so exercise its powers as to ensure that the wakf under its superintendence are properly maintained, controlled and administered By virtue of this power conferred upon the Board, it can call upon the muthavalli to submit the accounts and budgets to it As far as the administration of Wakf properties are concerned, the civil Court should not deal with the matter in view of the statutory provisions

Held, it is the duty of the muthavalli to obey the directions of the Wakf Board in the matter of getting the suit properties registered under the Act and submitting accounts etc to it, notwithstanding the fact that there is a scheme framed by the civil Court in force It was further held that since the Wakf Board has got jurisdiction to call upon the muthavalli to submit accounts to it, he need not file any returns to the civil Court under the scheme decree

Appeal against the Decree of the District Court of South Arcot at Cuddalore in Appeal Suit No 204 of 1962, preferred against the decree of the Court of the Subordinate Judge, Cuddalore in Original Suit No 83 of 1960.

D. Ramaswami Ayyangar, for *K Venugopala Iyengar,* for Appellant.

M. A. Sattar Sayeed, for Respondent

The Court delivered the following

JUDGMENT.—This Second Appeal arises out of a suit filed by the appellant for a declaration that the proceedings dated 9th February, 1959, and 26th March, 1959, of the respondent, State Wakf Board, requiring the appellant to have the suit Durga

* S.A No. 55 of 1964 19th December, 1967.

and its properties registered, to accounts, budgets and returns and threatening prosecution and imposition of penalties otherwise under the Wakf Act are void illegal and without jurisdiction

Both the Courts below have held that the Wakf Board has got jurisdiction to ask the appellant to have the suit Durga registered and to send the accounts and budgets. Hence the Second Appeal by the aggrieved plaintiff It is necessary to state a few facts that led to the filling of the suit

It is common case that the properties set out in the plaint and situate at Killai, Chidambaram Taluk, were originally granted by the Nawab to the predessor -in-title of the appellant There were other disputes with which we are not concerned now. Finally, a scheme was framed in O S No 10 of 1909, on the file of the Sub-Court, Mayuram, according to which trustees were appointed for the suit properties and provisions were made for their management According to the scheme, the appellant has been sending the budget on the 15th March of every year and had the accounts audited by an Auditor appointed by the Court The appellant contends that when a vlaidly framed scheme is in force, the Wakf Board cannot take proceedings under the Wakf Act and call upon the Muthavalli to get the Durga and its properties registered and to send accounts and budgets and returns to it

The Wakf Act has been introduced for the purpose of securing better administration and supervision of Wakf properties The Act provides that the State Government may appoint for the State a Commissioner of Wakfs for the purpose of making a survey of Wakf properties existing in the State at the date of the commencement of the Act. The Act has also provided for the establishment of Wakf Baord Under section 15 of the Act, the general superintendence of all wakfs, in the State vests in the Board, and it is the duty of the Board to exercise its powers under the Act as to ensure that the wakf under its superintendence are properly maintained, controlled and administered and the income thereof is duly applied to the objects and for the purpose for which such wakfs were created or intended It is conceded that the suit Durga and its properties are Wakf properties It is not in dispute that there is a scheme in regard to these propertie It is also common case that the scheme was in force even prior to the coming into force of the Wakf Act. Nonetheless, the suit properties will be covered by the Act, since the Wakf Act applies to all wakf whether created before or after the commencement of the Act By virtue of the power conferred on it, the Wakf Board has directed the appellant to have the Durga and its properties registered under the Act and submit accounts It is true that under the Scheme framed by the Court, the appellant is under the obligation to file the budget, get it audited by an Auditor appointed by the Court and then get it passed by Court Because the appellant is asked now to get the properties registered under the Wakf Act and submit accounts to the Wakf Board, he contends that he is asked to send accounts to two bodies exercising parallel jurisdiction over the same wakf properties.

The contention of the appellant cannot be sustained Once the statutory Act has come into force for the purpose of securing better administration and supervision of wakf properties and it creates an obligation and enforces the performance in a specified manner, the general rule is that that performance cannot be enforced in any other manner The general superintendence of all Wakf vests in the Board and the Board's duty is to do exercise its powers as to ensure that the wakfs under its superintendence are properly maintained, controlled and administered By virtue of this power conferred upon the Board, it can call upon the Muthawalli to submit the accounts and budget to it As far as the administration of wakf properties are concerned, the civil Court should not deal with the matter in view of the statutory provisions In *Narayanamurthi* v *Achayya Sastrulu*[1], this Court observed

"It is far from desirable that Courts should assume to themselves the continued supervision of institutions, for the management of which they are called upon to frame schemes. In fact, under such scheme the Courts of Law constitutes themsel-

1. (1924) 47 M L J 714 and 718

ves in some manner as temple committees and the whole burden of such functions for all time is thrown upon the Courts It is very undesirable that the Courts should be burdened with such tasks Even in the interests of institutions themselves it is doubtful if such provisions are calculated to promote their improvement or efficiency "

In *State of Madras* v *Sri Mahalingaswami Devasthanam*[1] dealing with the provisions of the Madras Hindu Religious and Charitable Endowments Act, a Division Bench of this Court has observed that the power to call for a budget, though vested in the Court under the Scheme, vests in the Commissioner after the commencement of the Act and the civil Court has no jurisdiction to call for or approve a budget, and that after the coming into force of the Act, the trustee should submit the budget only to the Commissioner and not to the Court In *Mayadhar* v *Orissa Boad of Wakfs*[2], dealing with an application by the Muthavalli for sanction of lease, the Court observed that after the passing of the Wakf Act, 1954, the Board had been given specific powers for grant of lease for a term exceeding three years, that such a provision barred the jurisdiction of the civil Courts to take cognizance of an application asking for sanction of such leases and that it was open to the parties to make such an application to the Board itself which alone was competent to accord sanction

On a review of the law on the subject, it is quite clear that it is the duty of the Muthawalli to obey the directions of the Wakf Board in the matter of getting the suit properties registered under the Act and submitting accounts etc , to it, notwithstanding the fact that there is a scheme framed by the civil Court in force No doubt the appellant has filed the present suit for a declaration that the Wakf Board has no such jurisdiction But since I have concurred with the finding of the Courts below that the Wakf Board has got jurisdiction to call upon the Muthavalli to submit the accounts to it, he need not file any returns to the civil Court under the scheme decree

In the result, the Second Appeal is dismissed. There will be no order as to costs No leave

S.V.J. ——— *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE M M ISMAIL

Govindasami Pillai .. *Appellant**

v.

T M. Srinivasa Chettiar and others *Respondents*

Civil Procedure Code (V of 1908), *sections* 9 *and* 11 *and the Madras Estates Land Reduction of Rent) Act (XXX of* 1947) *(as amended by Act XXIX of* 1956), *section* 3-A (4) (b)—*Madras Estates Land Act (I of* 1908)—*Jurisdiction of Court*—Res judicata—*Determination of—Suit lands held to be pannai by Tribunal under section* 3 (a) *under Act XXX of* 1947—*Under section* 3 (4) (b), *Tribunal's finding final—Not liable to be questioned in any Court of law—Writ petition against that order—In the meanwhile suits by landlord for rents—Decreed—Pending appeal, writ petition dismissed observing "petitioner's proper remedy is to institutie suit"—Effect of—Whether determines question regarding civil Court's jurisdiction—Whether amounts to* res judicata—*Civil Court's jurisdiction to determine nature of tenure*

Transfer of Property Act (IV of 1882), *and Madras Cultivating Tenants Protection Act (XXV of* 1955), *section* 2 (a)—*Agricultural lease—Provisions of Transfer of Property Act as such inapplicable—Heirs of original lessee will be cultivating tenants.*

Before a plea of *res judicata* can be sustained either under the provisions of the Civil Procedure Code or under the general principle, it must be established that

1 (1957) I M L J 350 I L R (1957) Mad 752 2 A I R 1966 Orissa 208

* S.A Nos 345 of 1963, 571 of 1961 and 1357 and 1557 of 1965 , C M P. Nos 5770 and 5771 of 1967. 24th January, 1968

the determination which is said to constitute *res judicata* was with reference to a matter which was directly and substantially in issue between the parties in the earlier proceedings. The writ petition was dismissed after the suit was decreed and before the appeal was disposed by the Subordinate Judge. With the result, neither the judgment in the writ petition nor the pleadings in the writ petitions were filed in these proceedings for the purpose of establishing that the question regarding the jurisdiction of the Civil Court was directly and substantially in issue between the parties in the writ petition. Even this will be sufficient to reject the plea of *res judicata* raised by the appellant's Counsel.

The statement contained in the order disposing of the writ petition that " the petitioner's proper remedy is to institute suit " does not constitute a determination on the question regarding the jurisdiction of the civil Court. No doubt, that statement was the basis on which the writ petition was dismissed. But that will not by itself constitute that statement a determination of the question regarding the jurisdiction of the civil Court to go into an issue whether a particular land is a ryoti land or not.

The question of jurisdiction is really a matter between a party and a Court and cannot be said to be a matter between the parties before the Court. Whether a particular party raises the question regarding the want of jurisdiction of a Court or not, it is the duty of the Court to take note of the statutory provisions conferring jurisdiction on it or taking away the jurisdiction from it. If, under the law, the Court has no jurisdiction, no amount of consent, acquiescence or assertion on the part of any of the parties can confer jurisdiction on the Court.

In the light of the principles laid down in *Jwala Bebi* v. *Amir Singh*, (A.I.R. 1929 All. 132) and *Nathan* v. *Harbans Singh*, (A.I.R. 1930 All. 254) and *District Board of Dharbanga* v. *Suraj Narain*, (A.I.R. 1936 Pat. 198), to apply the principle of *res judicata* and to contend that the statement contained in the order of this Court dismissing the writ petition conferred jurisdiction on the civil Court which has been expressly taken away by the statute will be not only illegal and contrary to law, but also contrary to public policy. Whenever a question of jurisdiction is involved it will be the duty of the Court to consider the same and decide it. The principle of *res judicata* cannot be allowed to defeat the provisions of a statutory enactment which affects jurisdiction, and a party cannot by his admission, omission or previous conduct or consent confer jurisdiction on a Court, where none exists.

The lands are agricultural lands and the leases were agricultural leases. That being the case, the provisions of the Transfer of Property Act as such will not apply. In view of section 2 (*a*) of the Madras Cultivating Tenants Protection Act, 1955, the appellants in S.A. No. 1357 of 1965 as heirs of the original lessee, will be cultivating tenants within the scope of the Act.

C. M. P. No. 5770 *of* 1967 *in S. A. No.* 345 *of* 1963.—Petition praying that in the circumstances stated therein and in the affidavit filed herewith the High Court will be pleased to permit the petitioner to raise additional grounds filed therewith and mentioned hereunder in the above Second Appeal No. 345 of 1963.

(1) The village of Mathi having been notified and taken over by the State Government under the Madras Act XXVI of 1963, the title of the landholder is extinguished and the suit is liable to dismissal.

(2) In any event the landholder being entitled to a patta under Madras Act XXVI of 1963, only if he proves cultivation for a consecutive period of three years within a period of 12 years immediately before the 1st April, 1960, the decree passed merely on the footing of the order of the Special Deputy Collector under Madras Act XXX of 1947, could not be sustained.

(3) The village being an existing inam estate, the order of the Special Deputy Collector not operating after the vesting of the lands must be held to be ryoti and the

provisions of section 56 of Act XXVI of 1963 are applicable to the case and on that ground also the suit is liable to dismissal

(4) In any event the decree of the lower appellate Court has to be set aside and the matter remitted back to the lower appellate Court for considering the scope and effect of the notification under Act XXVI of 1963.

C.M P. No. 5771 *of* 1967 *in S A. No* 571 *of* 1964 —Petition praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to permit the petitioner herein to raise additional grounds filed therewith and mentioned hereunder in the above Second Appeal No 571 of 1964.

Appeals against the decrees of the Court of the Subordinate Judge, Kumbakonam, in Appeal Suit Nos. 114 of 1960, 20 of 1963, 63 and 66 of 1964 preferred against the decrees of the Court of the District Munsif of Kumbakonam in Original Suit Nos. 74 of 1959, 136 of 1962, 110 of 1963, respectively.

K. Parasaran, for Appellant.

R. Kesava Iyengar and *K. Yamunan,* for Respondents.

The Court delivered the following

JUDGMENT —These four appeals raised a common question S A No. 1557 of 1965 is filed by the respondents in S A. No 1357 of 1965 to the extent to which the decisions of the Courts below went against them.

The short facts, the narration of which is necessary for the purpose of appreciating the rival contentions of the parties, are that the village of Mathi in Tanjore district is an estate to which the Madras Estates Land Act of 1908 and the Madras Estates Land (Reduction of Rent) Act, 1947 applied , but not the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 The respondents to the first three appeals claimed that the lands with reference to which they filed the present suit for recovery of rent were private lands It is the common case of the parties that a notification under the Madras Estates Land (Reduction of Rent) Act, 1947 was made by the Government fixing reduced rates of rent for ryoti lands in the village of Mathi. However, the Madras Estates Land (Reduction of Rent) Act, 1947 as originally passed did not contain any provision for deciding the question whether a particular piece of land is a ryoti land or a private land in an estate with reference to which a notification has been made under the said Act. Subsequently, by an amendment made in 1956, namely, Madras Act XXIX of 1956, section 3-A was introduced prescribing the machinery for the purpose of determining whether any land in a village is or is not ryoti land Under that section, provision was made for determining that question by the Collector and a right of appeal was provided to the Tribunal having jurisdiction over the village. Section 3-A (4) (*b*) of the Act states that the decision of the Tribunal on the appeal shall be final and shall not be liable to be questioned in any Court of law.

In this case, the respondents herein filed an application before the Collector for determining the question whether the lands involved in these appeals are ryoti lands or private lands. The application was transferred to the Revenue Divisional Officer, Kumbakonam, who by an order dated 20th February, 1959, made in M.A No. 22 of 1957 decided that the lands are private lands. The appellants herein took up the matter on appeal to the Tribunal, and the Tribunal by its order dated 12th March, 1960, dismissed the appeal thereby confirming the conclusion of the Revenue Divisional Officer that the lands are private lands and not ryoti lands At that stage the respondents herein filed suits for recovery of rent from the appellants herein. The appellants resisted the claim on several grounds, the most important of which is that the lands are ryoti lands situate in an inam estate and therefore the respondents are not entitled to file the suit in the civil Court for recovery of rent After the Tribunal dismissed the appeal, the respondents preferred a writ petition on the file of this Court for quashing the order of the Tribunal. By an order dated 4th April, 1962, Veeraswami, J., dismissed the writ petition in the following terms :

"The petitioner's proper remedy is to institute a suit The petition is dismissed. The rule is discharged. No costs."

I must point out at this stage that the suits filed by the respondents herein were decreed by the learned District Munsif of Kumbakonam, and against the said judgments and decrees, the appellant herein had preferred appeals to the learned Subordinate Judge of Kumbakonam, and during the pendency of the said appeals, the order above quoted in the writ petition was passed by this Court. Before the learned Subordinate Judge, the appellants put forward only two contentions, namely, the suit lands are not private lands of the plaintiff and the Civil Court had jurisdiction to go into that question and secondly there was no relationship of landlord and tenant between the parties Except in the appeal which has given rise to Second Appeal No. 1357 of 1965, in all the other appeals, the learned Subordinate Judge held that the relationship of landlord and tenant existed between the parties With regard to the question as to whether the lands are private or ryoti lands, he came to the conclusion that the order of the Estates Abolition Tribunal holding that the lands are private lands was final and the civil Court had no jurisdiction to go into that question. Since the order in the Writ Petition had been passed by that time, an argument seems to have been advanced before the learned Subordinate Judge that in view of the terms of the order in the Writ Petition, the civil Court had jurisdiction to go into the question as to whether the lands were private lands or ryoti lands. The learned Subordinate Judge dealt with this contention in his judgment in the following terms :

"The learned Counsel for the appellants also urged another aspect of the case. His contention is that inasmuch as in the Writ Petition No 401 of 1960 filed by him to quash the order of the Estates Abolition Tribunal in this case, the High Court has been pleased to observe that the petitioner's proper remedy is to institute a suit, he is entitled to put forward a defence that the suit lands are not private lands of the plaintiffs and that they are ryoti lands It is not possible for me to accept such a contention. No such right of defence is given to the appellants in the suit in question His right to question the character of the land in the suit has been barred as already observed by me under the provisions of the Amending Act referred to above."

With the result, the appeals preferred by the appellants herein were dismissed. The above facts arise in S A. No 345 of 1963 and the facts in the other appeals are similar with some immaterial differences in dates, etc With regard to the appeal which has given rise to Second Appeal Nos 1357 of 1965 and 1557 of 1965, there was a further question that was decided by the learned Subordinate Judge. The learned Subordinate Judge applying the provisions contained in the Transfer of Property Act held that the defendants in the suit who were not the original lessees, but the sons of the original lessees, were not tenants and consequently, they were trespassers, and they were liable to pay damages for use and occupation. In S A No. 1357 of 1965, preferred by the tenants, the decision of the learned Subordinate Judge is challenged not only on the ground that the Civil Court had jurisdiction to decide the question whether the suit land is ryoti land or private land, but also on the ground that the finding of the learned Subordinate Judge that the appellants were only trespassers was illegal. S.A No 1557 of 1965 filed by the landlord against the same judgment in addition to challenging the finding of the learned Subordinate Judge that the respondents therein were not tenants, but trespassers, also challenges the quantum of the amount awarded by the Subordinate Judge as damages for use and occupation. Therefore, the common question that arises in all these appeals is whether the civil Court has jurisdiction to go into the question whether the suit lands are ryoti lands or private lands The additional question that arises for consideration in S A. No 1357 of 1965 and 1557 of 1965 is, whether the conclusion of the learned Subordinate Judge that the appellants in S A No 1357 of 1965 were only trespassers is correct or not. I shall first dispose of the additional ground arising in S.A. Nos. 1357 of 1965 and 1557 of 1965.

The common case of the parties is that the lands are agricultural lands and the leases were agricultural leases If that was the case, the provisions of the Transfer of Property Act as such will not apply If the case of the landlord that the lands are private lands is accepted, then the provisions contained in the Madras Cultivating Tenants Protection Act, 1955 will apply. Section 2 (*a*) of the Act defines 'cultivating tenant' in relation to any land as meaning a person who carries on personal cultivation on such land, under a tenancy agreement, express or implied, and includes any such person who continues in possession of the land after the determination of the tenancy agreement and the heirs of such person, but does not include a mere intermediary or his heirs In view of this definition, the appellants in S A No 1357 of 1965 as heirs of the original lessee will be cultivating tenants within the scope of the Act. Consequently, the conclusion of the learned Subordinate Judge that the appellants in S A No. 1357 of 1965 are trespassers cannot be supported On this question, there was no dispute before me between the two parties

With regard to the amount awarded to the appellant in S A No. 1557 of 1965, that being a finding on a pure question of fact, its correctness cannot be canvassed in the Second Appeal Therefore, S A Nos 1337 of 1965 and 1557 of 1965 will be allowed to the extent of vacating the finding of the learned Subordinate Judge holding that the appellants in S A No 1357 of 1965 are trespassers and not tenants.

Then remains the common question arising in all the appeals as to the jurisdiction of the civil Court to determine whether the suit lands are private lands or ryoti lands I have already referred to the provision contained in section 3-A (4) (*b*) of Madras Act XXX of 1947 That provision makes it abundantly clear that the decision of the Tribunal whether a particular land is a ryoti land or not is final and the correctness of that decision cannot be canvassed in any Court of law If authority is needed in support of such a conclusion, reference can be made to the decision of the Supreme Court in *Desikacharyulu* v *State of A.P* [1] dealing with a similar provision contained in the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 Mr K Parasaran, the learned Counsel for the appellants in these cases did not contend that notwithstanding the provision already referred to by me, a civil Court has got jurisdiction to decide whether a particular land in an estate is a ryoti land or not On the other hand, in view of the express provision contained in section 3-A (4) (*b*) of the Act, no such contention is possible. The contention of Mr Parasaran is that the order in the writ petition constitutes *res judicata* as between the parties so as to prevent the respondents from raising the contention that the civil Court had no jurisdiction to determine whether the lands in question are private lands or ryoti lands It is unfortunate that the express provision contained in section 3-A (4) (*b*) of the Act was not brought to the notice of the learned Judge who disposed of the writ petition I must also point out one further fact Against the order in the Writ Petition, the appellants preferred a Writ Appeal to this Court, but they have chosen to withdraw the same. Under these circumstances, the contention of the learned Counsel, Mr K Parasaran, is that the statement contained in the order in the Writ Petition, namely, the petitioner's proper remedy is to institute a suit, constitutes the determination of the question whether the civil Court has jurisdiction to decide whether the lands in question are pivate lands or ryoti lands or not and that determination has been rendered by this Court in the presence, of both the parties and hence binding on both the parties, and consequently it is not open to the respondents to raise the plea of want of jurisdiction in the civil Court on this point in the suits for recovery of rent instituted by them On the other hand, the contention of Mr R Kesava Iyengar, the learned Counsel for the respondents, is that the dismissal of the Writ Petition would operate as a *res judicata* preventing the appellants herein from raising the contention that the suit lands are ryoti and not private lands. Mr. R Kesava Iyengar in support of his contention relied on the decisions of the Privy Council in *Watson* v *The Collector of Rajshahye* [2] and in *Fateh Singh* v *Jagannath Baksh*

1. A I R 1964 S.C. 807.
2. (1869-70) 13 M I.A 160.

Singh[1], the decision of the Calcutta High Court in *Abdul Hamid* v *Bijoy Chand*[2] the decision of the Patna High Court in *Ganesh* v. *Baidyanath*[3] and the decisions of this Court in *Krishnaswami* v *Manikka*[4] and *Veeravagu* v *Manikkavasagam*[5]. In reply the contention of Mr K Parasaran is that none of these decisions will prevent him from putting forward the contention that the lands are ryoti lands, because the writ petition filed by the appellants was not dismissed after considering the merits, but summarily, on the ground that the alternative remedy of a suit was available to the appellants

In the view I am taking in relation to the first contention of Mr K Parasaran, it is unnecessary for me to decide whether the dismissal of the writ petition would constitute *res judicata* so as to prevent the appellants from raising the contention that the suit lands are ryoti lands.

So far as the main question argued by Mr. K Parasaran, is concerned, I must point out that the learned Counsel was not able to bring to my notice any decision which has taken the view that a civil Court whose jurisdiction has been expressly taken away by the statutory provisions can get jurisdiction by having recourse to the principle of *res judicata* Mr Parasaran relied on the decision of the Supreme Court in *State of West Bengal* v. *Hemant Kumar*[6]. In my view, that decision does not lay down any such proposition. Really speaking, it is very doubtful whether such a plea of *res judicata* will be available to the appellants at all Before a plea of *res judicata* can be sustained either under the provisions of the Civil Procedure Code or under the general principles, it must be established that the determination which is said to constitute *res judicata* was with reference to a matter which was directly and substantially in issue between the parties in the earlier proceedings. *Explanation III* to section 11 of the Civil Procedure Code states that the matter referred to in the section must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other As I pointed out earlier, the writ petition was dismissed after the suit was decreed and before the appeal was disposed of by the Subordinate Judge. With the result, neither the judgment in the writ petition nor the pleadings in the writ petition were filed in these proceedings for the purpose of establishing that the question regarding the jurisdiction of the civil Court was directly and substantially in issue between the parties in the writ petition Even this will be sufficient to reject the plea of *res judicata* sought to be raised by the learned Counsel for the appellants However, I do not want to rest my conclusion on this somewhat narrow and technical ground, in view of the fact that Counsel for both the parties before me relied on the same order as constituting *res judicata* against the opposite party The question that really falls for determination in these Second Appeals is whether the statement of this Court while dismissing the writ petition that " the petitioner's proper remedy is to institute a suit " can be said to be a determination on the question regarding the jurisdiction of the civil Court to entertain a plea whether a land in an estate is a ryoti land or not For one thing, I am unable to accept the contention of the learned Counsel that the statement contained in that order disposing of the writ petition constitutes a determination on the question regarding the jurisdiction of the civil Court No doubt, that statement was the basis on which the writ petition was dismissed. But that will not by itself constitute that statement a determination of the question regarding the jurisdiction of the civil Court to go into an issue whether a particular land is a ryoti land or not Apart from this, the question of jurisdiction is really a matter between a party and a Court and cannot be said to be a matter between the parties before the Court. Whether a particular party raises the question regarding the want of jurisdiction of a Court or not, it is the duty of the Court to take note of the statutory provisions conferring jurisdiction on it or taking away the jurisdiction from it. If, under the law, a Court has no jurisdiction, no amount of

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1 (1925) L R 52 I A 100 · 48 M L J 64
2 A I R 1932 Cal 108
3 A I R 1958 Pat 270.
4. A.I.R. 1931 Mad. 268.
5 A I R 1934 Mad 68
6 (1963) 2 S C J 680 · (1963) M L J. (Cr) 613 A I.R 1966 S.C. 1061.

consent, acquiescence or assertion on the part of any of the parties can confer jurisdiction on the Court In *Raleigh Investment Co, Ltd.* v. *Governor-General in Council*[1], the Privy Council pointed out that " it is *pars judicia* to take jurisdiction into consideration and the section has to be considered ". Therefore, in the light of this statement of the law, whenever a party comes before the Court and raises the plea that a particular land in an estate is a ryoti land or private land, it is for the Court to consider the provision contained in section 3-A (4) (*b*) of the Act and take that into account for determining whether it had jurisdiction to proceed with the matter or not. In *Jwala Debi* v. *Amir Singh*[2], it has been observed thus :

"There can be no doubt that a decision on a point of law is as much binding on the parties, in a subsequent litigation provided other ingredients for a principle of *res judicata* to apply are present, as a decision on a point of fact The question whether the previous decision was right or wrong is entirely irrelavant ; but these considerations do not apply where a question of jurisdiction arises. Looked at closely, a question of jurisdiction, although it may be raised by the defendant, is a question that virtually arises between the plaintiff and the Court itself The plaintiff invokes the jurisdiction of the Court The defendant may or may not appear. If the Court finds that it has no jurisdiction to entertain the plaint, it will order the return of it for presentation to the proper Court The defendant, if he appears, and if he so chooses, may point out to the Court that it has no jurisdiction A decision of the question of jurisdiction does not affect in any way the status of the parties or the right of one party to obtain redress against the other. The fact that a decision as to jurisdiction is not binding on the parties in a subsequent litigation will be apparent from this Suppose instead of instituting the present suit in the revenue Court, the appellant had gone to the civil Court and asked for redress. She could not rely on the decision of the revenue Court in order to induce the civil Court to exercise jurisdiction in the matter of her suit. She could not say that because the decision was given as between herself and the defendant, the presiding officer of the civil Court was bound to exercise jurisdiction although he had not got it. She would not be heard if she said that the defendant was precluded from saying that the revenue Court had no jurisdiction to entertain the suit. As I have said, looked at closely, it will be found that a question of jurisdiction is not a question which may be said to have arisen between the parties."

The principles underlying this decision were followed by a Bench of the same High Court in *Nathan* v *Harbans Singh*[3]. In *District Board, Dharbanga* v *Suraj Narain*[4], it has been held thus

" That brings me to the question whether a question of law can be said to be subject to the principle of *res judicata* . Questions of law are of all kinds and cannot be dealt with as though they were all the same Questions of procedure, questions affecting jurisdiction, questions of limitation, may all be questions of law In such questions, the rights of parties are not the only matter for consideration The Court and the public have an interest. When a plea of *res judicata* is raised with reference to such matters, it is at least a question whether special considerations do not apply. .. In the question of jurisdiction, not only parties themselves, but the Court and the public had an interest "

In the light of these principles, to apply the principle of *res judicata* and to contend that the statement contained in the order of this Court dismissing the writ petition conferred jurisdiction on the civil Court which has been expressly taken away by the statute, will be not only illegal and contrary to law, but also contrary to public policy. Whenever a question of jurisdiction is involved, it will be the duty of the Court to consider the same and decide it. The principle of *res judicata* cannot be allowed to defeat the provisions of a statutory enactment which affects the jurisdiction of a Court, and a party cannot by his admission, omission or previous conduct or consent confer jurisdict on on a Court, where none exists Hence I

1. (1947) F C R 59 . (1947) 2 M L J 16 : L R. 74 I A 50 at 61
2. A I R. 1929 All. 132.
3. A I R 1930 All 254
4. A.I.R. 1936 Pat 198.

hold that the order of this Court in Writ Petition does not operate to confer jurisdiction on the civil Court to decide whether the suit lands are ryoti lands or not, which jurisdiction has been taken away by the express provision contained in section 3-A (4) (*b*) of Madras Act XXX of 1947 No other question arises in these appeals or was argued before me

The result is, I dismiss S A. No. 345 of 1963 and S A No. 571 of 1964. S A. Nos 1357 of 1965 and 1557 of 1965 will stand allowed to the extent indicated already by me, namely, to the extent of vacating the finding of the learned Subordinate Judge that the appellants in S A No 1357 of 1965 are not tenants, but trespassers and will stand dismissed in other respects. There will be no order as to costs in any of these appeals No leave

In view of the above conclusion of mine, C M P Nos 5770 of 1967 and 5771 of 1967 are dismissed.

S V.J. ——— *S A Nos* 345 *of* 1963 *and* 571 *of* 1964 *dismissed*, *S. A Nos* 1357 *and* 1557 *of* 1965 *allowed to the extent of vacating the finding*, *in other respects dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

Messrs. Carborandum Universal Ltd, Manufactuiers of Coated and Bonded Abrasives, Madras . *Petitioners**

v.

Asst Collector of Customs, Appraising Department, Custom House, Madras and others . *Respondents.*

Customs Tariff Guide, schedule 1, *Items* 48 (*c*) *and* 72 (3)—*Interpretation*—' *Silk Bolting Cloth*'—*If formed the component part of a machinery specially adopted for the purpose.*

The petitioners imported from manufacturers in Switzerland, for use in their manufacture of coated and bonded abrasives, an article known as " Silk Bolting Cloth" which according to them is an indispensable component part of the machinery designed to effect the proper sieving of grains which are used in the manufacture of abrasives.

The question for determintion is whether they should pay customs duty under Item 72 (3) of the First Schedule of the Import Tariff under the heading "component parts of machinery" or under Item 48 under the description "Fabrics, not otherwise specified, containing more than 90 per cent of silk, including such fabrics embroidered with artificial silk "

Held, that the reference to the use of the cloth in other types of machinery like flour mills, printing machinery, textile printing machinery etc, would not rule out the contention of the petitioner that it formed the component part of a machinery specifically adopted for that purpose The further observation by the Customs authorities about the possibility of its use as a wearing apparel misses the mark so entirely that it would seem to be an irrelevant consideration

This is not a case where the Customs Authority had to make an election between two possible alternative classifications, one under one item of the Indian Customs Tariff Guide and the other under another item of the same Guide which was more favourable to the revenue The classification made by the Department of the article in question could not be made by any reasonable interpretation of the provision in Item 48 (*c*) relied upon by the Department On the other hand, the petitioner's claim for its classification appears to be clearly valid

* W.P. No 3350 of 1965 22nd March, 1968.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the Assistant Collector of Customs, Appraising, Custom House, Madras in S 7/253/64 CAD dated 16th March, 1964, and quash the order dated 16th March, 1964, as confirmed by the Appellate Collector of Customs, Madras, in his order No C-3 727/64 PAD, dated 10th June, 1964, and further confirmed in order No 337-*A* of 1965, dated 2nd April, 1965, in File No 13/764/64/Cus. 11-A and passed on 19th April, 1965, by the Government of India, Ministry of Finance, Department of Revenue, New Delhi.

K. P. Jagadeesan, for Petitioner.

Habibulla Baksha, for Respondent.

The Court made the following

ORDER —The point which arises for decision in this writ petition is a brief one. The petitioner, Messrs Carborandum Universal Ltd. Madras, imported from manufacturers in Switzerland, for use in their manufacture of coated and bonded abrasives, an article known as "Silk Bolting Cloth" which is, according to their affidavit, an indispensable component part of the machinery designed to effect the proper sieving of grains which are used in the manufacture of abrasives. The petitioner has taken the trouble to show the blueprint of the machinery wherein, this 'Silk Bloting Cloth' which is of a standard measurement of 40" x 30" or 80 cms x 100 cms exactly fits into the standardised frames manufactured for the purpose. The petitioner purchased "Silk Bolting Cloth' under an import licence from manufacturers in Switzerland and had the necessary invoices It wanted to pay customs duty under item 72 (3) of the First Schedule of the Import Tariff under the heading 'Component parts of machinery as defined in items Nos. 72, 72 (1) and 72 (2) and not otherwise specified, namely, such parts only as are essential for the working of the machine or apparatus and have been given for that purpose some special shape or quality which would not be essential for their use for any other purpose but excluding small tools like twist drills and reamers, dies and taps, gear cutters and hacksaw blades ". The duty payable under this item is 20 per cent *ad valorem*. The Customs Authorities, however came to a different conclusion and in their view, this commodity has to be classified under item 48 which is described in the schedule as "Fabrics, not otherwise specified, containing mo[illegible] per cent of silk, including such fabrics embroidered with artificial silk " for which 120 per cent, *ad valorem* plus Rs. 13-80 per kilogram is provided The petitioner's contention that the proper duty leviable was under item 72 (3) was overruled and the higher 120 per cent duty was levied. The petitioner has filed this petition under Article 226 of the Constitution for the issue of a writ of *certiorari* quashing the above order of the Customs Authority, which was confirmed by the second and third respondents respectively.

It is contended by the petitioner that ' Silk Bolting-Cloth ' is an essential part of the machinery used for the manufacture of abrasives, that it was intended for that purpose, and that its suppliers had also cut the cloth into the specified measurements for the purpose of fitting into frames. It is also alleged by the petitioner that the material is costly and the price works out to Rs. 42 per yard and that the material would not have been cut into small sizes, unless the measurements had become specialised for the purpose of the particular machinery, into which the cloth had to be fitted. In other words, according to the petitioner, though the article in question is composed of silk fabric, the fact that it has been cut into a standardised measurement of 40" x 30" or 80 cms x 100 cms will be strong indicia to show that it had become specially adopted for its use as a component part of the machinery.

In the counter affidavit filed to the writ petition by the Department, it is stated that formerly silk Bolting Cloth was being used exclusively for flour milling machinery but it has been subsequently reported that it has got a larger use in other than flour mills, for instance, in printing, in sifting abrasive grains, in textile printing etc., and there is a further observation that there is a possibility of its also being used as a wearing apparel, and such a possibility could not be ruled out altogether. It was in these altered circumstances that it was assessed under item 48 (*c*).

The reference to the use of the cloth in other types of machinery like flour mills, printing machinery textile printing machinery etc would not rule out the contention of the petitioner that it formed the component part of a machinery specially adopted for the purpose. The further observation about the possibility of its use as a wearing apparel appears to me to miss the mark so entirely that it would seem to be an irrelevant consideration. Considering the high price of the cloth at Rs. 42 per yard which is the price according to the petitioner, and that it has been imported after being cut into a specified size of 40" x 30" or 80 cms x 100 cms. it is extremely improbable that intending purchasers of the cloth for use as wearing apparel, would go in for these pieces with the ever present risk of their being more or less than what body measurements would require, if it has to be used as wearing apparel. Thus it is very unlikely that a lady, who would like to buy this costly silk cloth at Rs 42 per yard, would go in for a cut piece, knowing full well the risk that her body measurement would require the need to supplement it by stitching on to it more pieces of the same cloth. The idea that these uniformly cut pieces in standard sizes of costly cloth will be used as wearing apparel appears to be opposed to reality as well as common sense. Therefore I hold that this is not a case where the Customs Authority had to make an election between two possible alternative classifications, one under one item of the Indian Customs Tariff Guide and the other under another item of the same guide which was more favourable to the revenue In that event, following the dicta in several decisions of the Supreme Court including *A. V. Venkateswaran* v. *R. S. Wadhwani*[1] followed in *Collector of Customs* v. *Ganga Setty*[2], the decision of the Customs Authority would not be open to interference by this Court in writ proceedings under Article 226 of the Constitution. On the other hand, this appears to be a case where the Customs Authorities when faced with every probability and every justification for classifying this item under item 72 (3) of the Schedule, decided to classify it under item 48 (*c*) under circumstances which are opposed to common experience and also ordinary knowledge of the limitations in the use to which a textile fabric altered into a particular form and shape can be put into From this point of view, the classification made by the Department of the article in question appears to be one which could not be made by any reasonable interpretation of the provision in item 48 (*c*) relied upon by the Department On the other hand the petitioner's claim for its classification appears to be clearly valid

This Writ Petition is, therefore, allowed. No order as to costs.

V.M.K. *Writ petition allowed.*

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1. (1962) 1 S C R. 753 (1962) 1 S C J. 170: (1962) 1 M.L J. (S C) 83 (1962) 1 An. W.R. (S.C.) 83 . A.I.R. 1961 S.C. 1506.

2. (1963) 2 S C R 277. (1963) 2 S C J. 235. (1963) 2 M L J (S C) 75 : (1963) 2 An.W.R. (S.C) 75 : A.I.R. 1963 S.C. 1319.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE M M ISMAIL.

The Trivandrum Permanent Fund, Nagercoil .. *Appellant**

v.

K. M. A. Mohamed Mohideen Sahib .. *Respondent.*

Civil Procedure Code (V of 1908), *section* 47, *Order* 21, *Rules* 90 *and* 92, *Order* 43 *and Order* 47—*Mortgage decree—Decree-holder purchaser—Petition to set aside sale—Court, without giving notice to the applicant before passing order, directing applicant to furnish security—Whether justifiable—Application for reviewing the order—Application allowed —Security not demanded—Appeal against this order—Whether maintainable—Interference in appeal.*

Civil Procedure Code (V of 1908), *section* 47 *and Order* 21, *rule* 90—*Order dispensing with furnishing of security—Affects rights of parties—Appeal competent.*

Civil Procedure Code (V of 1908), *Order* 21, *rule* 92 *read with Order* 43 (1) (j)—*Appeal, when lies*

The order directing the respondent(applicant under Order 21, rule 90, Civil Procedure Code) to furnish security is an order which is undoubtedly prejudicial to the respondent and no order prejudicial to a party can be passed without giving him and opportunity to show cause, prior to the passing of such an order. Consequently, the order of the lower Court, dated 19th October, 1965, was clearly unjustifiable and therefore the lower Court was fully justified in recalling that order or reviewing that order subsequently.

Whenever an order is sought to be reviewed, it involves two stages The first stage is to consider the earlier order, and if the Court comes to the conclusion that the order is liable to be reviewed, to set aside the same. Having set aside that order, the Court passes a fresh order in the proceedings in which the order which was set aside was originally passed If an appeal lies against the final order under some other provision of law, the provisions of Order 47, rule 1 (2) cannot bar the appeal

Under Order 21, rule 92, read with Order 43, rule 1 (*j*), an appeal lies only against an order setting aside a sale or confirming a sale after disallowing an application to set aside the sale Since the disallowing of an application to set aside sale automatically involves the confirmation of sale, an appeal will lie under these provisions against an order disallowing an application to set aside the sale But the present order cannot be said to come within the scope of Order 21, rule 92 and therefore it is not maintainable under Order 43, rule 1 (*j*) read with Order 21, rule 92, Civil Procedure Code

The order dispensing with the furnishing of the security by the respondent affects the rights of the parties, and the matter, being in relation to the execution and satisfaction of the decree, falls within the scope of section 47 Therefore an appeal is competent under section 47, Civil Procedure Code.

Held on facts, the learned Subordinate Judge has not referred to any material circumstances on the basis of which he came to the conclusion that no security need be demanded in this case If he had taken into account all the circumstances and had come to the conclusion that no security need by demanded, such an order would not have merited any interference by this Court But on the terms of the present order, it cannot be said that he has taken into account all relevant circumstances before coming to the conclusion that no security need be demanded.

* A. A. O. No. 52 of 1966. 20th February, 1968.

Appeal against the Order of the Court of the Subordinate Judge, Negercoil, dated 23rd November, 1965 and made in E.A No 415 of 1965 in O S No. 15 of 1951

R Gopalaswami Iyengar, for Appellant

S Thyagaraja Iyer, for Respondent.

The Court delivered the following

JUDGMENT —O S No 15 of 1951 instituted by the appellant herein was based on a mortgage and a decree therein was passed on 28th October, 1953 The amount for which the decree was passed is said to be over Rs 50,000. The mortgaged properties were brought to sale on 6th April, 1961, and the decree-holder himself purchased the same for a sum of Rs 37,450. Thereafter the respondent herein who was the first defendant in the suit and to whose family the property belonged, filed an application to set aside the sale under the provisions of Order 21, rule 90 of the Civil Procedure Code On 9th January, 1962, the Court passed an Order directing the respondent herein to furnish security Against the said order, the respondent preferred A A O No. 154 of 1962 on the file of this Court On 4th August, 1965 this Court set aside the order of the lower Court dated 9th January, 1962 and directed that " the lower Court may, if it considers necessary, call upon the appellant to furnish security as required under Order 21, rule 90, Civil Procedure Code, and dispose of the petition according to law " On receipt of the records back from this Court, the learned Subordinate Judge, Nagercoil, before whom the execution proceedings were pending, passed an order on 19th October, 1965 to the following effect —

" Furnish security by 25th October, 1965 "

Notice of this order was sent to the parties It appears that on 25th October, 1965 at the request of the respondent herein, the Court extended the time to 2nd November, 1965 Against on 2nd November, 1965 at the request of the respondent, the Court extended time till 8th November, 1965 Thereafter on 8th November, 1965, the respondent herein filed E A No 415 of 1965 under section 151 and Order 47, rule 1 of Civil Procedure Code, praying for an order holding that security need not be furnished and to recall the directions to furnish security In the affidavit filed in support of the said application, the respondent herein put forward three grounds, namely, (1) the order dated 19th October, 1965 was passed without giving an opportunity to the respondent to show cause why security should not be directed to be furnished, and if he had been given an opportunity to show cause, he would have satisfied the Court that this was a case in which no security need be demanded, (2) the decree being a mortgage decree, the Court failed to consider whether any security at all is necessary, and (3) the petition filed by the respondent to set aside the sale had been numbered as E A No 381 of 1965, and consequently that petition had been admitted, and when once the petition had been admitted, the Court had no jurisdiction to demand security from the respondent The learned Subordinate Judge, Nagercoil, by his order, dated 23rd November, 1965 allowed this application He has stated as follows

> "The Court has to consider whether it is necessary to call upon the petitioner to furnish security The decree is a mortgage decree The case of the petitioner is that the property is worth Rs one lakh The decree is on the basis of a mortgage. Therefore, there is ample security for the amount due thereunder. To require the judgment-debtor to give security once over for the amount covered by the decree is quite unwarranted. The terms of the first proviso to Order 21, rule 90, Civil Procedure Code, would be inappropriate in the case of a mortgage decree as there is already a subsisting security for the amount covered by the decree and the sale proclamation I am of the view that in these circumstances, security need not be demanded "

It is against this order, the decree-holder-purchaser has filed the present appeal.

Mr. S Thyagaraja Iyer, learned Counsel for the respondent raised a preliminary objection as to the maintainability of the appeal. According to him, the appeal is not maintainable because the order appealed against is not an order coming within the scope of either section 47 or Order 43 of Civil Procedure Code, and if it is intended to be an appeal against the order granting review by the learned Subordinate Judge, such an appeal will lie only on the grounds mentioned in Order 47, rule 7, since the provisions of Order 43, rule 1 (*w*) is controlled by the provisions contained in Order 47, rule 7 Consequently I have to consider the question whether the appeal filed by the decree-holder-purchaser is maintainable at all Mr R. Gopalaswamy Iyengar, learned Counsel for the appellant contended that the appeal lies under the provisions of Order 43 since the order appealed against is one under Order 21, rule 92, Civil Procedure Code Learned Counsel further contended that the order will come within the scope of section 47 also and therefore, an appeal will be available The further contention of the learned Counsel is that the grounds on which the order of remand can be appealed against are not limited to the grounds mentioned in sub-rule (2) of rule 4 of Order 47, and consequently, the appeal is maintainable even under Order 43, rule 1, clause (*w*).

In order to clear the ground, I would like to mention the fact that so far as the learned Subordinate Judge sought to cancel the order passed by him on 19th October, 1965, he was fully justified The provision for furnishing security has been introduced by an amendment made to Order 21, rule 90 by the Madras High Court and the said amendment is in the following terms.

" Provided that the Court may, after giving notice to the applicant, call upon him before admitting the application, either to furnish security to the satisfaction of the Court for an amount equal to that mentioned in the sale warrant or to that realised by the sale, whichever is less, or to deposit such amount in Court:

Provided also that the security furnished or the deposit made as aforesaid, shall be liable to be proceeded against only to the extent of the deficit on a re-sale of the property already brought to sale"

In this case, the facts narrated above by me will show that before passing the order on 19th October, 1965, on receipt of the orders from this Court, the learned Subordinate Judge did not give notice to the respondent Consequently, there has been a failure on the part of the learned Subordinate Judge to comply with the requirements of the rule Apart from that, the order directing the respondent to furnish security is an order which is undoubtedly prejudicial to the respondent and no order prejudicial to a party can be passed without giving him an opportunity to show cause, prior to the passing of such an order Consequently, the order of the learned Subordinate Judge dated 19th October, 1965 was clearly unjustifiable and therefore the learned Subordinate Judge was fully justified in recalling that order or reviewing that order subsequently

The next question is whether against that order granting a review of the earlier order dated 19th October, 1965, an appeal will lie Mr S Thyagaraja Iyer's contention is that an appeal against an order granting a review will lie only if there had been a contravention of the provisions contained in Order 47, rule 4, Civil Procedure Code The said rule is in two parts The first sub-rule of Rule 4 provides that when it appears to the Court that there is no sufficient ground for review, it shall reject the application

Sub-rule (2) of Rule 4 provides —

" Where the Court is of opinion that the application for review should be granted, it shall grant the same

Provided that—

(*a*) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree or order, a review of which is applied for, and

(*b*) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation."

According to rule 7 of Order 47, so far as it is relevant for the purpose of this case, an order granting an application may be objected to on the ground that the order was in contravention of the provisions of rule 4. Mr. Thyagaraja Iyer contends that there has been no violation of rule 4 (2) (*a*), since the review was granted only after giving notice to the appellant and hearing him. There has been no violation of rule 4 (2) (*b*) also since the review was not granted on the discovery of new matter or evidence which the respondent alleged was not within his knowledge or could not be adduced by him when the original order was passed or made, without strict proof of such allegation. On the other hand, the review was granted on the basis that the Court on the earlier occasion failed to observe the requirements of law. Consequently, no appeal will lie against such an order within the scope of rule 7 of Order 47 read with Order 43, rule 1, clause (*w*). In support of this contention, Mr Thyagaraja Iyer relied on a decision of this Court in *Srinivasa Ayyangar* v *Official Assignee, Madras*[1], and also a passage occurring in Mulla on Code of Civil Procedure, 13th Edition, Vol II, page 1679 to the effect that " the preponderance of judicial opinion in Madras is also in favour of the view that an appeal lies against an order granting review only on the grounds mentioned in rule 7." As against this, Mr. R. Gopalaswamy Iyengar relied on the decision of this Court in *Ananthalakshmi* v *H I. & F. Trust*[2], and a decision in *Francis* v. *Ouseph*[3]. The decision in *Srinivasa Ayyangar* v. *Official Assignee, Madras*[1], is, as the head note itself reads:

" Although Order 43, rule 1 (*w*) of Civil Procedure Code allows an appeal against an Order under rule 4 of Order 47 granting an application for review, yet, the Order 43, rule 1 (*w*) is subject to the restrictions and limitations placed by Order 47, rule 7. Hence no appeal lies against an order granting review if the appeal is not on any of the grounds mentioned in Order 47, rule 7 "

As against this, the learned Judges in *Ananthalakshmi* v *H I & F. Trust*[2], have stated as follows

" A preliminary objection was taken on behalf of the Company by its managing director, that the appeal was not maintainable, as the conditions of Order 47, rule 7, Civil Procedure Code, were not fulfilled. According to that rule, an order granting an application for review could be objected only on the ground that the order was in contravention of the provisions of rule 2 or rule 4 or that the application for review was barred by limitation and there was no sufficient cause. This objection, though very plausible and has some support in decided cases, does not appear to us to be invulnerable. An appeal would lie on the ground that an order granting review was in contravention of the provisions of rule 4. Rule 4 (1) says that,

' Where it appears to the Court that there is not sufficient ground for review, it shall reject the application '

So if the Court does not reject the application where there is no sufficient ground for review but grants the application, then it contravenes rule 4. We do not see any justification for construing ' rule 4 ' in rule 7 (1) (*b*) as confined to rule 4 (2). But we do not think it necessary to finally decide this question, because even assuming that an order permitting a review, that is to say, allowing the case to be reopened, is not by itself appealable, there is nothing to prevent an appeal being filed against the final order passed after a reconsideration. That

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1. (1927) 52 M L J 682 : (1927) I L R 50 Mad. 891.
2. (1951) 2 M.L.J. 19 : A.I.R. 1951 Mad. 927.
3. A.I.R. 1953 Trav.-Co. 441.

order on review can be attacked on the merits in an appeal, see *Govinda Chetti v. Rangammal*[1]."

I must point out that the decision of a Bench of this Court in *Srinivasa Ayyangar* v. *Official Assignee, Madras*[2], referred to already was not brought to the notice of the learned Judges who decided the case in *Ananthalakshmi* v *H I. & F. Trust*[3] In view of this, and in view of the fact that the learned Judges themselves in the *Ananthalakshmi's case*[3], did not think it necessary to decide the question finally, I am not prepared to hold that contrary to the decision in *Srinivasa Ayyangar* v. *Official Assignee, Madras*[2], the ruling in *Ananthalakshmi* v *H. I. & F. Trust*[3], has held that Order 43, rule 1 (*w*) is not controlled by the provisions of Order 47, rule 7. However, even as far as the present case is concerned, as the learned Judges pointed out in the latter case, the appeal is not against the order of the learned Subordinate Judge granting review, but against the order passed by him finally after the grant of the review As a matter of fact, whenever an order is sought to be reviewed, it involves two stages The first stage is to consider the earlier order, and if the Court comes to the conclusion that the order is liable to be reviewed, to set aside the same. Having set aside that order, the Court passes a fresh order in the proceedings in which the order which was set aside was originally passed In the present case, the learned Subordinate Judge by the order appealed against, after having set aside his order dated 19th October, 1965, has passed a fresh order holding that the respondent need not furnish security Consequently, the present appeal is not strictly an appeal against an order granting a review, but an appeal against the final order made after the review was granted. Therefore, I am of the view that if an appeal lies against the final order under some other provision of law, the provisions of Order 43, Rule 1 (*w*) cannot bar the present appeal This takes me to the question whether the present appeal is competent under any other provision of law Mr R. Gopalaswamy Iyengar contended, as I pointed out already, that the order appealed against is an order passed under Order 21, rule 92, Civil Procedure Code, and there fore is appealable under Order 43, rule 1 (*j*) I am unable to agree with this contention Under Order 21, rule 92, read with Order 43, rule 1 (*j*), an appeal lies only against an order setting aside a sale or confirming a sale after disallowing an application to set aside the sale Since the disallowing of an application to set aside a sale, automatically involves the confirmation of the sale, it has been held by decided cases that an appeal will lie under these provisions against an order disallowing an application to set aside the sale. But the present order cannot be said to come within the scope of Order 21, rule 92 Mr R Gopalaswamy Iyengar contended that any intermediate steps or step towards the setting aside of a sale or confirmation of a sale will come within the scope of order 21, rule 92. I am unable to accept this contention Mr R Gopalaswamy Iyengar has not been able to bring to my notice any principle or authority supporting such a contention. Therefore, I hold that the present appeal is not maintainable under Order 43, rule 1 (*j*) read with order 21, rule 92, Civil Procedure Code.

Mr Gopalaswamy Iyengar ultimately contended that the appeal lies under section 47 of Civil Procedure Code He contends that the question has arisen between the judgment-debtor and the decree-holder who has purchased the property and this matter relates to satisfaction of the decree. Consequently, the matter falls within the scope of section 47 Mr. Gopalaswamy Iyengar conceded that it cannot be said that every order that may be passed by a Court in the course of an execution will fall within the scope of section 47, Civil Procedure Code. But according to him any order affecting the rights of parties as between the judgment-debtor and the decree-holder will fall within the scope of section 47, Civil Procedure Code The basis of this argument is that if the respondent is permitted not to furnish security, then his application to set aside the sale will be gone into on merits On the other hand, if the respondent is required to furnish security and he fails to furnish security, his application to set aside the sale will not be investigated into

1 A I R 1929 Mad 261
2. (1927) I L R 50 Mad. 891 : (1927) 52 M L J 682
3 (1951) 2 M L J. 19. A I R. 1951 Mad 927.

and that will result in the confirmation of the sale of the property in favour of the appellant Consequently, this order dispensing with the furnishing of security by the respondent affects the rights of the parties, and the matter is in relation to the execution and satisfaction of the decree Hence, the matter falls within the scope of section 47, and an appeal lies I am inclined to agree with this contention Therefore I hold that this appeal is competent under section 47 of the Civil Procedure Code.

The next question is whether the order of the learned Subordinate Judge calls for any interference I have already extracted the reasons given by the learned Subordinate Judge for modifying his earlier order As I pointed out earlier, the learned Subordinate Judge was fully justified in vacating or recalling the earlier order passed by him on 19th October, 1965 The question is whether there was any justification for substituting the fresh order passed by him or, in other words whether the new order passed by him is justified Mr S Thyagaraja Iyer contended that the order passed by the learned Subordinate Judge is justified He says that the property is of the value of Rs one lakh and the property being the subject-matter of the mortgage and the decree-holder having the mortgaged property as security, there is no need to call upon the respondent to furnish security As against this, Mr R Gopalaswamy Iyengar contends that the fact that the property was sold only for a sum of Rs 37,450 itself will be an indication that the property is not of sufficient value so as to warrant the dispensing with of furnishing security by the respondent herein As far as I am concerned, all that I am pointing out at this stage is that the learned Subordinate Judge had not considered this question, before coming to the conclusion that the respondent need not furnish any security. I must point out here that the learned Subordinate Judge appears to have proceeded on the basis that the provisions regarding the furnishing of security is inappropriate in the case of a mortgage decree, as already a subsisting security for the amount covered by the decree and the sale proclamation is there Mr Gopalaswamy Iyengar points out that this view is wrong He contends that the fifth defendant in the very same suit filed an application to set aside the sale, and a similar order was passed in his case requiring him to furnish security and that matter came up to this Court in A A O No 191 of 1962 and L P A No 91 of 1964 In its judgment, dated 12th December, 1966, a Bench of this Court in the said L P. Appeal stated as follows :

> " It is submitted that it is a case of a mortgage decree and in the case of a mortgage decree, security need not be demanded But it is not an inflexible rule that no security should be demanded on an application under Order 21, rule 90, Civil Procedure Code, in the case of a mortgage decree Cases may differ and require security be demanded even in the case of mortgage decrees."

Consequently, Mr Gopalaswamy Iyengar argues that the view of the learned Subordinate Judge that the decree is on the basis of a mortgage and therefore there is ample security for the amount due thereunder is erroneous He contends that taking into account the fact that it is a mortgage decree and the other relevant circumstances, the Court will have to decide whether security is required or not. Mr Thyagaraja Iyer, learned Counsel for the respondent, in view of the decision of the Bench of this Court in the L P Appeal mentioned above, very rightly does not contest this position But he contends that the learned Subordinate Judge has taken into account all the relevant facts and has exercised the discretion and therefore his order does not call for any interference in the appeal I am unable to agree The learned Subordinate Judge has not referred to any material circumstance on the basis of which he came to the conclusion that no security need be demanded in this case No doubt, there is the sentence in his order that the case of the respondent is that the property was worth Rs one lakh The order does not make it clear that the learned Judge accepted that case of the respondent. Consequently, it is for the learned Subordinate Judge to come to a conclusion whether security should be called for or not, after taking into account the value of the property, other encumbrances, if any, existing on the property and the amount

of liability thrown on the property by the decree in question and any other relevant factor or circumstance If he had taken into account all these circumstances and had come to the conclusion that no security need be demanded, such an order would not have merited any interference by this Court. But on the terms of the present order, I am unable to say that he has taken into account all the relevant circumstances before coming to the conclusion that in this particular case, no security need be demanded Mr Thyagaraja Iyer points out that the object of demanding security under the proviso to Order 21, rule 90 is to meet any deficiency that may occur as a result of a re-sale, and taking into account the fact that the earlier sale took place in 1961, there should have been inevitable appreciation of the property during the period of these seven years and consequently if the property is to be resold again, there will be no deficiency at all and therefore there is no warrant for demanding the security That again is a matter which the learned Subordinate Judge has to take into account and consider In view of all these, I allow this appeal and set aside the order of the learned Subordinate Judge dated 23rd November, 1965 The result of that will be that the learned Subordinate Judge will have to consider afresh, whether the circumstances of this case warrant calling upon the respondent to furnish any security or not, after taking into account all the relevant factors. There will be no order as to costs

S V. J. ——— *Appeal allowed, Lower Court directed to consider afresh.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction.)

PRESENT —MR JUSTICE P RAMAKRISHNAN.

P M. Chinnayya Kurumba Goundar and others .. *Petitioners**

v

The State of Madras represented by the Collector of South Arcot at Cuddalore, and others . *Respondents*

Madras Preservation of Private Forests Act (XXVII of 1949), section 3 (2)—Complete prohibition of customary Ponal Kadu *cultivation in private forests on the ground that it is destructive of the forests—If justified*

Madras Timber Transport Rules—Transport of forest produce outside forest limits—Rule requiring that only Form II permits printed and supplied by the Range Officer [illegible] for each form should be used—Selling Form II books in advance to the forest owner for use as and when required would be substantial compliance with this requirement.

Madras Preservation of Private Forests Act (XXVII of 1949), section 3 (1) (a)—Scope—If invalid as imposing an unreasonable restriction.

The approach made by the forest authorities that *ponal kadu* cultivation should be completely prohibited (in the jagirs in the instant case which were notified as private forests under the Madras Preservation of Private Forests Act), because it would have the effect of destroying the forests and that it is a most undesirable form of cultivation one could think of as it would lead to quick denudation of vast forest areas, cannot be supported. That hill areas, which contain jungle growth, can be cultivated and were being customarily cultivated by the hill tribes living therein, appears to be plain However, such cultivation is liable to a great deal of abuse and even destructive of the forest, if they are not carefully controlled by permits and the controls enforced by suitable supervision of the forest authorities But total deprivation of this customary right must be viewed as one which cannot be permitted under the Madras Preservation of Private Forests Act The preamble to the Act itself states that one of its objects was to preserve customary rights and at the same time save private forests from denuda-

* W P Nos 1571 and 1823 of 1964, 1896 and 4622 of 1965 — 7th July, 1967

tion. Where a system of permits and also proper control for enforcing the condition of those permits can be improvised, there is no reason why the Collector purporting to act under section 3 (2) of the Act should prohibit *ponal kadu* cultivation altogether as he had done in this case.

The necessary notification regarding the regulation of *ponal kadu* cultivation may be issued under section 6 (*ii*) of the Act or by rules under section 10 (2) of the Act. Such rules would prevent the officers entrusted with the duty of granting permits or permission from acting arbitrarily or capriciously in individual cases. But until such time when a notification of the above kind is issued or rules are prescribed the present order of the Collector summarily rejecting, without giving any reason, the request for *ponal kadu* cultivation cannot be upheld. The failure to give reasons will deprive the appellate authority as well as the aggrieved party of an opportunity to find out whether the refusal has been for proper reasons or arbitrary reasons.

An amendment of the Madras Timber Transport Rules obliges private forest owners to restrict themselves to Form II permits printed and supplied by the Range Officer on payment of 5 paise for each form, for removal of minor forest produce or wind-fallen or dry timber outside the limits of the forest. The grievance of the land-holder (owner of the forest) is that the delay entailed in the procedure causes loss to him, the forest produce being liable to speedy decay In such a situation it will be proper for the forest department to direct the land-holder to purchase Form II books from the department in advance, on the latter making an indent for this purpose, for use by him as and when required If this course is adopted, it will amount to substantial compliance with the revised Timber Transport Rules and also save the land-holder from undue hardship envisaged above.

Section 3 (1) (*a*) of the Madras Preservation of Private Forests Act does not contain an absolute prohibition It allows for certain transactions to be sanctioned with the previous sanction of the Collector This restriction can be viewed as reasonable where the provision for the grant of previous sanction is enforced from the point of view of the public good visualised in the preamble to the Act, namely, preventing indiscriminate destruction of private forest and interference with the customary and prescriptive rights But where, in any given case (as in the instant case), the data show that the power under section 3 (1) (*a*) had been exercised arbitrarily or capriciously, it will be a proper case for striking down the order and for a direction that the application for sanction be considered on merits and in the light of relevant principles.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the respective affidavits filed therewith the High Court will be pleased to issue writs of *mandamus* or other appropriate directions, directing the respondent to forbear from interfering with the petitioner's transport of forest material gathered within the limits of the petitioner's jagir (Kurumba Goundar Jagir in Kallakurichi Taluk, South Arcot district) to places outside his jagir (in W P No 1571 of 1964) from interfering with the cultivation in Ponalkadu area within the limits of Jadaya Goundar Jagir in Kallakurichi Taluk, South Arcot District, under the Madras Preservation of Private Forest Act (XXVII of 1949) (in W P No 1828 of 1964) ; from interfering with the cultivation in Ponalkadu area within the limits of Kurumba Goundar Jagir in Kallakurichi Taluk, South Arcot district under the said Act (in W P No 1896 of 1965) and from obstructing the first petitioner from enjoying the forest within the limits of Kurumba Goundar Jagir, South Arcot District either by granting leases or licences or by employing his men (in W P. No. 4622 of 1965).

V. Vedantachari, for Petitioners.

The Government Pleader, for Respondents.

The Court made the following

ORDER.—These writ petitions deal with connected matters and therefore they were heard together. The petitioners in these writ petitions seek for relief against the operation of the Madras Preservation of Private Forests Act, 1949 (Madras Act (XXVII of 1949), which has been extended to certain well-known jagirs on the Kalriyan Hills, known as Jadaya Goundar Jagir and Kurumba Goundar Jagir. The South Arcot District Gazetteer refers to a third similar jagir on the same hills called Ariya Goundar Jagir. But we are concerned in these writ petitions only with the first two jagirs. The present proprietor of Kurumba Goundar Jagir is the petitioner in Writ Petition No. 1896 of 1965 and the first petitioner in Writ Petition Nos. 1571 of 1964 and 4622 of 1965, and the present proprietor of Jadaya Goundar Jagir is the petitioner in Writ Petition No. 1828 of 1964. The principal contentions of the petitioners in the writ petitions can be set down briefly as under.

The petitioners in Writ Petition No. 1828 of 1964 and 1896 of 1965, who are the proprietors of Jadaya Goundar and Kurumba Goundar Jagirs respectively urge that from time immemorial a certain form of cultivation had been carried on in the hill tracts of the jagirs described as *ponal kadu* cultivation, a process which can be succinctly described as shifting cultivation. The hill folks who reside in the hills obtain their food by such cultivation. This is a customary right which they had been enjoying. After the notification of the forest areas in the jagirs as private forests under section 1 (2) of the Madras Preservation of Private Forests Act, 1949 (hereinafter called the Act), the officials in the forest department, under threat of prosecution, have been preventing the petitioners as well as the inhabitants of the hills, from carrying on *ponal kadu* cultivation, on the plea that such cultivation involves the clearing of shrubs and trees, that for the purpose of cutting trees, prior permission of the District Collector is required under section 3 (2) of the Act, and that without such permission *ponal kadu* cultivation cannot be allowed. The petitioners in these two petitions urged that such prevention involves an interference with the customary rights of the petitioner as well as the inhabitants of the hills. The very purpose for which the Act was passed, includes the preservation of customary and prescriptive rights in private forests besides the prevention of indiscriminate destruction of private forests. It is urged by the petitioners, that arbitrarily putting a stop to *ponal kadu* cultivation, has interfered seriously with the customary and prescriptive rights mentioned above, and that a writ of *mandamus* should issue to the respondents, namely, the District Forest Officer, South Arcot at Cuddalore and the State of Madras by the Collector of South Arcot at Cuddalore, forbearing them from interfering with *ponal kadu* cultivation in the limits of the jagirs above mentioned.

In Writ Petition No. 1571 of 1964, the petitioner is the proprietor of the Kurumba Goundar Jagir. It is alleged by the petitioner, that one of the incomes of the jagirdars consists of the receipts for the removal of timber and forest produce, from the hills. It was usual for the jagirdars to grant licences to the residents of the hills, to cut and gather wood and minor forest produce, subject to the obligation of selling them to the jagirdar or his nominee at market price, without selling to anybody other than the jagirdar. The jagirdar leases out his right in respect of such produce to a contractor. It was the practice for the residents of the hills to gather the produce and bring them to a depot maintained by the contractor of the jagirdar, and afterwards the contractor transports the produce thus gathered, to other places. To enable the contractor to transport the produce outside the Jagir limits, it was the practice for the jagirdar to issue permits in respect of the produce. After the Act was extended to the jagirs in question, an objection was taken to the grant of permits for transport of produce by the jagirdar. The jagirdar and his contractor filed a writ petition (W.P. No. 887 of 1952) and it came before Rajagopala Iyengar, J., who directed that the Government ought not to interfere with the rights of the jagirdars to purchase and dispose of the forest produce in accordance with the customary usage and transport it in the customary manner.

Thereafter, till 1959, the jagirdar was allowed to remove the said produce on permits issued by him, without any interference by the officials of the forest department However in 1959, the forest department began to insist that for such transport, Form II permits issued under the Timber Transport Rules of the forest department should be issued When the jagirdar approached the forest officials at Kallakurichi, for the issue of Form II permits, they gave him a great deal of trouble including delay on issue, and restricted the number of permits On each occasion when the jagirdar wanted to obtain a permit, the Forester would insist upon an examination of the stock, and this would lead to a great deal of delay in the issue of permits in question. In the meantime the forest materials being liable to speedy decay, would have decayed, and led to considerable loss and damage The jagirdar again filed a writ petition in this Court (Writ Petition No. 12 of 1962) which came up for hearing before Jagadisan, J While dealing with that writ petition, the learned Judge noticed that even under the Timber Transport Rules, the owner of a private forest, can himself issue the transport permits, provided the permits are affixed with a seal by the forest department—Officials to ensure the *bona fides* of the receipts subsequently produced by the contractor engaged in transporting them An assurance was given before the learned Judge by the Additional Government Pleader, that the department would take steps to issue permits without unnecessary dealy in future. Learned Counsel appearing for the petitioner also made a complaint to the Court, that he would have no objection to the transport of goods under permits so long as there was no delay or obstruction caused by the forest department The learned Judge observed that in the above circumstances, the petitioner had failed to make out a case for the issue of a writ of *mandamus* But he closed the judgment with the remark that in future, if the petitioner were to meet with any opposition or obstruction, on the part of the forest department, in the matter of removal or disposal of the forest trees, contrary to the provisions of the rules and the relevant statute, it would, of course be open to him to move the Court for appropriate relief.

The petitioner now urges that the officers of the Forest Department instead of affixing their seal to permit books produced by the petitioner as was the practice at the time when the above judgment of Jagadisan, J , was given, now rely upon an amendment of the relevant Timber Transport Rules, and insists that the petitioner should purchase on every occasion permits issued by the officials of the forest department at 5 nP for each permit. The petitioner urges that by this insistence, the same difficulties that prevailed at the time when the earlier writ petition came before this Court, have come into existence again and the petitioner is constrained to file this writ of *mandamus* for directing the respondents to forbear from interfering with his transport of forest material gathered within the limits of his jagir to places outside the jagir

Writ Petition No 4622 of 1965 is filed by the first petitioner, the proprietor of Kurumba Goundar Jagir, and petitioners 2 and 3, to whom the first petitioner granted a lease for two years from 23rd July, 1965, for gathering produce, for extracting timber, bamboos etc , and for removal of wind-fallen and dead trees from the jagir area While the Collector of South Arcot had granted sanction for such lease to a lessee Dasaratha Mudaliar on 12th July, 1963, in regard to the lease of petitioners 2 and 3 the Collector had refused the necessary permission by order dated 14th October, 1965, purporting to be passed under section 3 (1) (*a*) of the Act and without any reasons for the refusal

The petitioners urge that both section 3 (1) and section 3 (2) of the Act constitute unreasonable restrictions on the rights of the first petitioner to hold and enjoy property that they are *ultra vires* and invalid, and that they should be struck down as unconstitutional being opposed to Articles 14 and 19 (1) (*f*) of the Constitution of India The prayer in this petition is for the issue of a writ of *mandamus* directing the respondents, namely, the State of Madras and the District Forest Officer to forbear from interfering and obstructing the enjoyment of the first petitioner of the forest at all by granting leases or licences Before dealing with the prayers of the petitioners and the reliefs which could be granted to them, I will consider briefly the scope of the Act and the background against which the Act was enacted. At the

time when the President's Act (XII of 1954) was passed for extending the life of the Act, there is a reference in the following terms to the background of the Act.

"The Madras Preservation of Private Forests Act, 1949 (Madras Act XXVII of 1949) was passed with a view to prevent the indiscriminate destruction of private forests and interference with the customary and prescriptive rights therein. It requires the previous sanction of the District Collector for selling, mortgaging, leasing or otherwise alienating private forests.

The Act applies to forests situated in estates as defined in the Madras Estates Land Act, 1908 (Madras Act I of 1908) and also to private forests situated in other areas in the State of Andhra having a contiguous area of 100 acres which may be declared by the State Government to be forests for the purposes of the Act by notification in the Gazette.

The life of the Act was extended from time to time and on the last occasion when this was done upto the 2nd December, 1954, it was anticipated that a Bill which was then under contemplation for amending the Madras Forests Act, 1882 (Madras Act IV of 1882) and which was to embody *inter alia* the essential provisions of the Madras Preservation of Private Forests Act, would be passed into law before that date. This Bill is, however, still under consideration. Apart from this, there are still several estates which are yet to be taken over under the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 to which the Abolition Act aforesaid does not at present apply, such as the estates in which both the *melwaram* as well as the *kudiwaram* vest in the landholder etc. The need for preserving the forests in all such estates and for giving protection in respect of the private forests situated in areas other than 'estates' in the State, therefore, remained as before. As the Madras Preservation of Private Forests Act, 1949, expired on the 2nd December, 1954, the provisions of that Act were enacted by President's Act (XII of 1954) and the life of this Act extends upto the 2nd December, 1956. As there is no change in the circumstances, which necessitated the enactment of this Act, the Government consider it desirable to re-enact this Act with a slight modification designed to extend the life of the Act upto 2nd December, 1957."

The Andhra High Court in a decision reported in *Balarama Chetty* v. *State of Andhra Pradesh*[1], to which I shall make a further reference later in this judgment, observed at page 279 of the report:

"The Legislature intended to bring in legislation not only in regard to estates not covered by the Madras Estates (Abolition and Conversion into Ryotwari) Act but also to amend the Madras Forests Act, 1882. The contemplated Act, therefore, was not only to regulate the rights *inter se* between contending parties namely landholders and ryots but also to prevent the denudation of forests. In anticipation of the Act, as a temporary measure, the landholders were prevented from cutting the trees without the previous permission of the Collector."

In Madras, following the Act passed in 1949, another legislation, Madras Act (LV of 1961) was passed, providing for the taking over of the management of the private forests in certain areas in the State of Madras. The gist of this last mentioned Act, is that the Government is empowered to take over the management of any private forest whenever the Government think that it is necessary to take over its management, in the public interest or in order to secure proper management. After taking over such management, the Government is required under section 7 of the said Act to pay compensation at a certain rate to the owner of the forest. During the period of management, the Government have got powers of preserving, administering and managing the private forest as stated in section 5. Section 6 provides for the release of the forest from the Government management, either at the time specified in the notification, or even earlier, and the Government at that time is required to restore the private forest to the owner in as good a condition as it was when posses-

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1. (1957) 2 An.W.R. 272.

sion was taken This later Act also states that it provided for the taking over of the management of private forests only for a limited period. It may be noticed that this last mentioned Act was passed long after the Estates Abolition Act, it did not exclude from its operation even forests belonging to private owners if the requirements of ' forest ' as defined in the Act are satisfied The prime purpose of these temporary enactments was to safeguard forest wealth of the country and also the public interest in such forests Whereas in Madras State the steps contemplated by the Legislature for ensuring a measure of protection over private forests to preserve the forest wealth of the country in the interest of the public, comprised two stages, one under the Preservation of Private Forests Act, 1949 and the second under Madras Act (LV of 1961), in a similar provision for the taking over of the management of private forests, in Bihar, Bihar Act (XI of 1948), the entire process was covered by a single enactment. The procedure outlined in the Bihar Act has got analogies to the procedure for land acquisition There is an initial notification, when there is a proposal before the Government to constitute a private protected forest. These objections are heard, an enquiry is held, and finally the forest is declared to be a private protected forest. On such declaration, the Government take over the management of the forest, and there is a provision for payment, during the period of the control by the Government, of an allowance to the owner of the forest at a prescribed rate by way of compensation Unfortunately, in the working of the corresponding enactments in Madras State long intervals ensued between the notification extending the provisions of the Act (XXVII of 1949) to particular private forests as in the present case, and the subsequent action under Act (LV of 1961) which provides for the actual taking over of the management of such forest by the Government with payment of a compensation to the owner. In the interval, the owner has himself to manage the forest subject to the several restrictions imposed by the Act of 1949 That is the position of the two private forests in these present writ petitions. Even today their management had not been taken over under Act (LV of 1961) and the landholder continues to be subject to the restrictions imposed upon him by the Act of 1949 This state of affairs appears to ignore the fundamental position that the Act of 1949 was by its very nature only to be temporary. The Preamble to the Act has left it vague as to whether the interim nature of the Act of 1949, was pending an Act like Act (LV of 1961) providing for the management by the State of such forests or pending the taking over of such forests by the Government under the Estates Abolition Act. But it is clear that the Madras Estates (Abolition and Conversion into Ryotwari) Act had become law even in 1948. But the application of that Act to particular estates followed by the taking over of the estates by the Government very often took a great deal of time, and it is quite possible that the Act of 1949 also had in view the time covered by such a procedure also. It was stated at the time of the hearing of the present writ petitions that the taking over of the two hill jagirs by the Government under the Estates Abolition Act has been stayed by an order of the Supreme Court, and therefore the Government have not found it possile to take over either temporary management under Act (LV of 1961), or the estates altogether under the Abolition Act. This situation led to the forest lands in the two jagirs mentioned in the petitions being made subject to the restrictions imposed by the Act of 1949, without either of the two subsequent proceedings, which were naturally expected to follow, taking place within a reasonable limit of time, whether the taking over of temporary management under Act (LV of 1961) or abolishing the jagirs altogether and vesting in the Government under the Abolition Act With this preliminary account of the background of the relevant legislation it is possible to deal with the claims of the petitioners in these writ petitions under the following headings :

1. *Ponal kadu* cultivation is a customary right enjoyed by the villagers resident in the hill villages in the jagirs. Requests from the cultivators for permission for the purpose had been turned down summarily by the forest authorities on the ground that *ponal kadu* cultivation involved the cutting of trees, and the permission of the District Collector for such cutting of the trees under section 3 (2) should be required, but the Collector was not prepared to grant such permission on the ground

that *ponal kadu* cultivation would have the effect of destroying the forests, or, as put in the counter-affidavit of the respondents, *ponal kadu* cultivation

> " is the most undesirable form of cultivation one could think of, and by the indiscriminate burning of saplings, in the course of large scale *ponal kadu* cultivation, quick denudation of vast forest areas is the resulting evil which has to be prevented, and the Madras Preservation of Private Forests Act and its provisions are available to prevent this evil "

As against this, the petitioner's Learned Counsel has referred to an account in the South Arcot District Gazetteer (1906) in two places. At page 149, there is the following reference to the adverse effect of *ponal kadu* cultivation .—

> " . . the growth in these poligars' forests has been greatly degraded by the unrestricted shifting cultivation (*punakadu*) which has been carried on in them for years and which consists in felling and burning a patch of jungle, cultivating it in a casual manner for a couple of years and then deserting it in favour of a fresh patch "

What is objected to is only the unrestricted *ponal kadu* cultivation, but not where it could be suitably restricted At page 333 of the Gazetteer it is observed that *ponal kadu* or shifting cultivation is carried on on the wooded slopes, the jungle being cleared and burnt, the ground ploughed, and the seed sown broadcast, and that after one or two crops have been thus taken off it, the land is left fallow for a time until the growth has re-established itself, when the process is repeated Learned Counsel for the petitioners also has referred to a similar practice in the private forests in the Northern Sircars, which the forest department itself has recognised as proper for suitable control. At page 41 of the Madras Forest Manual, Volume II, under the heading " Rules to regulate the management of the forest and waste lands in the Vizianagaram Estate ", there is a provision for residents in the hill villages to carry on the *kondapodu* cultivation subject to restrictions as to how the cultivation has to be effected At page 22 of the same Manual, provision is made for *podu* cultivation by jungle people in the forest and forest lands in Bhimavaram estate These provisions are relied on by the learned Counsel for the petitioners in these writ petitions for the purpose of urging that a wholesale prohibition of *ponal kadu* cultivation will interfere with the customary rights of the residents of the hill villages, and considering that for a long time the two hill estates have been put under the restrictions of the Act of 1949 and it cannot be predicted when these restrictions will be removed, it will be appropriate to permit *ponal kadu* cultivation with suitable restrictions regarding acreage locality, the kind of trees that may be removed for making the land fit for cultivation, and also providing for the regeneration of the forest Such restrictions may be provided for by a suitable notification under section 6 of the Act This is the subject-matter of Writ Petition Nos 1828 of 1964 and 1896 of 1965

It appears to me, on a careful consideration of the circumstances set out above, that the approach made by the respondents that *ponal kadu* cultivation should be completely prohibited as it would have the effect of destroying the forests, and that it is a most undesirable form of cultivation one could think of as it would lead to quick denudation of vast forest areas, cannot be supported That hill areas, which contain jungle growth, can be cultivated and were being customarily cultivated by the hill tribes living therein, appears to be plain from the circumstances set out in the South Arcot District Gazetteer and also from the practice recognised by the rules framed in regard to private forests in the other zamindari areas of the Northern Sirkars when they were part of the Madras State before 1953 What appears from these rules is that such cultivation is liable to a great deal of abuse, and even destructive of the forests, if they are not carefully controlled by permit, and the controls enforced by the suitable supervision by the forest authorities, whenever the request is made for permits for such cultivation by the tribes who live inside the hill forests. Total deprivation of this customary right must be viewed as one which cannot be permitted under the Act of 1949 The Preamble to the Act itself states that one of its objects was to preserve customary rights and at the same time save private forests from denudation. Where a system of permits and also proper control for enforcing the

condition of those permits can be improvised, there is no reason why the Collector, purporting to act under the powers granted to him by section 3 (2) of the Act, should prohibit *ponal kadu* cultivation altogether as he has done in this case.

In this context, petitioners' learned Counsel draws my attention to the fact that while there is a power granted to the State Government in section 10 (1) of the Act to make rules for carrying out the purpose of the Act, the rules so far framed by the Government contain only directions to the Collector for the purpose of exercising his discretion under section 3 (2) of the Act for grant of permits to cut trees, the rules provide for the classes or kinds of trees which may be permitted to be cut and the girth of such trees, the terms and conditions subject to which permissions may be granted and the procedure to be followed by the Collector before granting permission, items which are also mentioned in section 10 (2) (*a*), (*b*) and (*c*) of the Act It is urged by the learned Counsel that grant of permission for *ponal kadu* cultivation must be viewed in a wider context than permission for cutting trees under section 3 (2), and such permission should be provided by section 6 (*ii*) of the Act which enables the State Government to issue notifications to regulate the exercise of customary or prescriptive rights in private forests What is, therefore, urged by the learned Counsel for the petitioners, is that this Court should give a direction to the State Government to issue a notification under section 6 (*ii*) of the Act for the regulation of *ponal kadu* cultivation on the analogy of parallel notifications extracted earlier in regard to Zamindari's private forests in the former Northern Sirkars Learned Counsel also draws my attention to the observations of the Andhra Pradesh High Court in *Balarama Chetty* v *State of Andhra Pradesh*[1] viz :

"The machinery provided by the restrictions should not confer an unregulated and arbitrary discretion on a single individual and the power conferred should not be far in excess of what is required in the interests of the public and for achieving the object for which the particular legislation was enacted Legislative practice may provide different guides and checks for the exercise of individual discretion The Act itself may prescribe the standard by which that discretion should be exercised or the statutory rules may afford a guide for its exercise Such a power is almost always controlled by an appellate authority or by civil Courts Even if a statute does not in terms enjoin on the officer to give reasons for his order, it is implicit in the exercise of judicial or quasi-judicial power that the person or tribunal exercising that power should give reasons, that is, should act judicially, particularly when his order is subject to an appeal Even if a statute is not struck down as unconstitutional, particular orders made under that Act are liable to judicial review if the powers are exercised arbitrarily and capriciously and if they amount to unreasonable restrictions on the fundamental rights of citizens "

Summing up, in my opinion, the circumstances clearly justify the issue of notification by the State Government regarding the regulation of *ponal kadu* cultivation The necessary notification may be issued under section 6 (*ii*) of the Act or by rules under section 10 (2) of the Act, which gives power to the State Government to make rules for carrying out the purpose of the Act Such power would also include the preservation of customary or prescriptive rights Such rules would prevent the officers, entrusted with the duty of granting permits or permission, from acting arbitrarily or capriciously in individual cases But until such time when a notification of the above kind is issued or rules like those mentioned above are prescribed, it appears to me that the present order of the District Collector summarily rejecting the request for *ponal kadu* cultivation cannot be upheld He has not given any reasons for the order, and the Andhra Pradesh High Court decision above cited, has commented that the failure to give reasons will deprive the appellate authority as well as the aggrieved party, of an opportunity to find out whether the refusal has been for proper reasons or for arbitrary reasons In the circumstances, the order has to be, and is accordingly, quashed with a direction that the District Collector should reconsider the application on merits and dispose of it in the light of the principles set down above

1. (1957) 2 An.W.R. 272 at 277.

2. Secondly it is urged that relying upon an amendment of the Timber Transport Rules, the forest authorities are insisting upon the petitioners-landholders obtaining a permit every time when minor forest produce or windfallen or dry timber is removed by a contractor from the places where those articles are stored inside the forest They are also required to pay 5 paise for each permit The judgment of Jagadisan, J, in Writ Petition No. 12 of 1962, referred to earlier, clearly gave a direction that the landholder should use his own forms for the necessary transport licences, after getting them affixed with the seal of the forest department The giving up of this procedure and insisting upon individual permits issued by the forest department cause undue harassment to the contractors under the landholders and should be remedied.

The answer of the department to this claim in their counter affidavit states that when in compliance with the directions in W P No 12 of 1962 the petitioner produced his privately printed permit books before the Forest Officer for affixture of seals, the Forest Officer called upon the petitioner to furnish certain particulars regarding the locality and the approximate quantity for which Form II permits were required by him Thereupon, the petitioner preferred a petition to the Collector of South Arcot to direct the District Forest Officer to affix unconditionally his seal on the printed Form II books produced by him The Collector declined to comply with the request The counter proceeded to allege that there was, subsequent to the disposal of W P No. 12 of 1962, an amendment of the Madras Timber Transport Rules, which obliged private owners of forests to restrict themselves to Form II permits *printed and supplied by the Range Officer* on payment of 5 paise for each Form and directed that no other permits should be used In view of the above subsequent developments the forest department were not in a position to comply with the directions in W P No 12 of 1962 It was urged that the Timber Transport Rules imposed reasonable restrictions in the interest of the public, and the petitioner, even though he is the owner of the private forest, is obliged to comply with the rules

After a careful consideration of the arguments for and against, it appears to me that the real conflict between the petitioner on the one hand and the authorities of the forest department on the other can be narrowed down to a very limited area and is also capable of a simple way of resolution The petitioner's real grievance arises from the fact that every time when there is an application by a contractor to remove a heap of timber or forest produce from the depot where the villagers have stocked it, the contractor with the assistance of the landholder is obliged to seek the local Forest Officer and apply for a separate permit Often the Forest Officer will be camping in a distant place and during the time taken to arrange for a meeting with him and for answering the points raised by him, the produce itself would decay or deteriorate and would be of no use to anybody. It was to provide against such a contingency that, before the amendment of the Timber Transport Rules, the landholder used a set of Form II books prepared by him, but to see that there is no abuse of such forms, the safeguard of getting the seal of the forest department affixed to the form books in advance was resorted to At the present moment the forest department has gone a step further and insist upon the landholder using the forms got printed by the department itself In such a situation it will be proper for the forest department to direct the landholder to purchase *Form II books* from the forest department *in advance* and use forms from such-books for supply to the contractor The books containing the forms can be supplied by the forest department to the landholder on the latter making an indent for the purpose in advance, and the actual quantity of the books being calculated on a reasonable estimate of the landholder's requirements based upon the previous years' figures Learned Counsel for the petitioner states that the landholder will be quite willing to pay for such books issued in advance the charges calculated at the rate of 5 paise for each form in the book If this course is adopted, it will amount to substantial compliance with the revised Timber Transport Rules and at the same time carry out the spirit of the directions given by Jagadisan, J., in W P No 12 of 1962 and also save the landholder as well as his contractor from undue hardship envisaged above. Therefore,

in regard to this complaint of the petitioner, there will be a direction that the authorities of the forest department should issue permit books in Form II in advance to the landholder on the latter's indent, keeping in mind the other principles mentioned above.

3 The third point arises from the pleadings in W P. No. 4622 of 1965 The gravamen of the charge of the petitioner in this case is that while the Collector of South Arcot had been granting in prior years sanction for the leasing out of the forest produce, suddently and arbitrarily he had refused to approve a lease granted by the proprietor for two years from 23rd July, 1965 to petitioners 2 and 3 in this writ petition for gathering forest produce and for removal of windfallen and dead trees from the jagir area It is urged by the learned Counsel for the petitioners that the section of the Act in the above form interferes with the fundamental rights of the petitioner in regard to enjoyment of his property and must be struck down as *ultra vires* under Article 19 (1) of the Constitution. Learned Counsel also submitted that when a similar ground about the constitutional validity of section 3 (1) was raised before the Andhra Pradesh High Court in the decision cited earlier *Balarama Chetty* v *State of Andhra Pradesh*[1], while the Bench held that section 3 (2) was *intra vires*, they observed that the question of the *vires* of section 3 (1) did not arise for consideration in the circumstances of the particular case. Learned Counsel urged that under the definition of ' owner ' in section 2 (*b*) of the Act, a mortgagee, lessee or other person having right to possession and enjoyment of the forest by assignment from the original owner would still be within the scope of the control proposed to be exercised in view of the Preservation of Forest Act Therefore, a " blanket order " by the District Collector refusing to sanction a lease as in the present case, must be considered to be arbitrary and not in furtherance of the purpose of the Act. One can visualise a case where an owner of a forest proposes to parcel out the forest into small bits with the result that each bit is less than the required minimum area, under the Act to constitute a forest, and by such sale in fragments he can defeat the purpose of the Act by making it very difficult to enforce control and also management A similar objection may be raised also in respect of mortgages of forests in piecemeal portions But on the other hand it is a well-known method of forest exploitation recognised even in the case of Government forests for the owner of the forest to lease out the rights to gather produce to contractors whether in respect of the entire area or in respect of parcelled-out areas with suitable conditions When the District Collector, as in the present case, refused to accord sanction for the leasing out of the right to collect forest produce to a contractor without assigning any reasons, it is difficult to determine by reading the order whether the Collector acted capriciously or within his rights for proper reasons As pointed out by the petitioner there is the circumstance that on a prior occasion the Collector had granted sanction It appears to me that so far as the prayer in this writ petition is concerned, it is not necessary to strike down section 3(1) (*a*) of the Act itself as *ultra vires* and unconstitutional For one thing section 3 (1) does not contain an absolute prohibition It allows for certain transaction to be sanctioned with the previous sanction of the Collector This restriction can be viewed as reasonable where the provision for the grant of previous sanction is enforced from the point of view of the public good visualised in the Preamble to the Act, namely, preventing indiscriminate destruction of private forest and interference with the customary and prescriptive rights But where in any given case the data show that the power under section 3 (1) (*a*) had been exercised arbitrarily or capriciously, it will be a proper case for striking down the order and for a direction that the application for sanction be considered on merits and in the light of relevant principles. Therefore, so far as this prayer is concerned, I shall content myself in this writ petition with striking down the order of the Collector refusing to sanction the lease outright without any reasons being given in support The Collector will be directed to restore the application to his file and dispose it of on merits and for adequate reasons

The Writ Petitions are allowed as above No order as to costs

V.K. *Petitions allowed.*

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1. (1957) 2 An.W.R. 272.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE N KRISHNASWAMI REDDI

VR. S RM Ramaswami Chettiar and others .. *Petitioners**

v

K. J Mahadevan .. *Respondent*

Madras General Sales Tax Act (I of 1959), section 41 (1) and (3) and section 57 (1) and 57 (2)—Production of documents—Applicability of sections 57 (1) and 57 (2)—Protection under section 57 (1)—Whether applies to documents seized

Evidence Act (I of 1872), section 124 —Privileged documents—Production of—Who can claim privilege

Only those documents which were produced under the provisions of the Madras General Sales Tax Act 1959 shall be treated as confidential and shall not be disclosed Section 57 (1) will not apply to the documents seized The protection given under section 57 (1) will apply to those documents produced voluntarily but not to the documents compulsorily taken or seized under the provisions of the Act Section 57 (1) applies only to the documents produced under section 41 (1) and not to documents seized under section 41 (3).

Clause (2) of section 57 applies to only prosecutions either under the Indian Penal Code or under the General Sales Tax Act in respect of any statement, return, account, registers, records, documents, evidence, affidavit or deposition made or produced in the course of the proceedings It does not apply to offences generally under the Indian Penal Code The offences committed in respect of the documents concerned in the proceeding either under the Indian Penal Code or under the General Sales Tax Act are alone exempted (On facts *held* that exemption provided under section 57 (2) will not apply)

The privilege can be claimed only by the public servant concerned and it is not open to private parties to claim privilege

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Fifth Presidency Magistrate of the Court of the Presidency Magistrate, Egmore, Madras, dated 18th August, 1967, and made in C C No 3408 of 1967.

N T Vanamamalai, for Petitioners.

G Gopalaswami for *S G Subramaniam*, for Respondent

The Court made the following

ORDER —This petition has been filed against the order of the Fifth Presidency Magistrate, Madras, directing the Deputy Commissioner of Commercial Taxes (Intelligence), Chepauk, Madras, to produce certain documents The respondent Mahadevan filed a private complaint against the revision petitioners VR S RM Ramaswami Chettiar and others under section 420, Indian Penal Code The respondent filed an application before the Fifth Presidency Magistrate to send for the following documents from the office of the Deputy Commissioner of Commercial Taxes (Intelligence), Chepauk, Madras

1 Report of the investigation undertaken by the Department of Commercial Taxes on the background given by the complainant on 21st April, 1966

2 A report of the investigation, and

3 The books of accounts seized by the Department of Commercial Taxes in 1954 from the office of M/s Chettiar Films both at Madurai and Trichy and from the houses of the partners of M/s Chettiar Films, or the copies of the above with reference to the picture "*Aval Yar*"

* Crl R C No 1026 of 1967 and
Crl R.P No 993 of 1967

13th November, 1967.

The Deputy Commercial Tax Officer concerned raised the objection that the documents mentioned above could not be exhibited in Court as they are privileged documents in view of section 57 of Madras General Sales Tax Act and section 124 of the Indian Evidence Act.

The respondent did not press for the production of the first two documents. As regards the documents mentioned in item (3) of the application, the Fifth Presidency Magistrate overruled the objection raised by the Deputy Commercial Tax Officer and allowed the documents to be exhibited. Hence this petition

The learned Counsel appearing for the petitioners contended that the documents mentioned in item (3) of the application were concerned in proceedings relating to the recovery of demand of sales tax and as such they shall be treated as confidential and shall not be disclosed and relies upon section 57 of the Madras General Sales Tax Act, 1959 Section 57 reads as follows —

" (1) *All particulars contained in any statement made, return furnished or accounts, registers, records or documents produced under the provisions of this Act or in any evidence given or affidavit or disposition made, in the course of any proceeding under this Act or in any record of any proceeding relating to the recovery of a demand, prepared for the purposes of this Act shall be treated as confidential and shall not be disclosed*

(2) *Nothing contained in sub-section (1) shall apply to the disclosure of any such particulars—(i) for the purpose of prosecution under the Indian Penal Code (Central Act XLV of 1860) or under this Act in respect of any such statement, return, accounts, registers, records, documents, evidence, affidavit or deposition ;. ......* "

It is contended by the respondent that section 57 (1) will not apply to this case by virtue of clause (2) as the prosecution was under the Indian Penal Code. This contention is not correct Clause (2) of section 57 applies to only prosecution either under the Indian Penal Code or under the General Sales Tax Act in respect of any statement, return, accounts, registers, records, documents, evidence, affidavit or deposition made or produced in the course of the proceedings It does not apply to offences generally under the Indian Penal Code The offence committed in respect of the documents concerned in the proceedings either under the Indian Penal Code or under the General Sales Tax (hereinafter called the Act) are alone exempted As the present prosecution is under section 420, Indian Penal Code, the exemption provided under clause (2) of section 57 will not apply.

But it is clear from the provisions of section 57, clause (1) that only those documents which were produced under the provisions of the Act shall be treated as confidential and shall not be disclosed In my opinion, section 57 (1) of the Act will not apply to the documents seized The protection given under section 57 (1) of the Act will apply to those documents produced voluntarily but not to the documents compulsorily taken or seized under the provisions of the Act Section 41 of the Act makes a distinction between production and seizure Section 41 (1) empowers the officer concerned to require a dealer to produce before him the accounts, documents etc Under clause (3) of the same section, if any officer empowered has reason to suspect that any dealer is attempting to evade the payment of any tax, he may seize documents, accounts, etc of the dealer As already noted, section 57 (i) of the Act applies only to the documents produced under section 41 (1) and not to the documents seized under section 41 (3) The documents mentioned in item (3) of the application are the documents said to have been seized by the officers I am, therefore, of the view that section 57 (1) will not apply to these documents The learned Counsel further contended that they are privileged documents under section 124 of the Evidence Act It is not open to the petitioners who are private parties to claim privilege. The privilege can be claimed only by the public servant concerned

The Revision Petition is dismissed

S V.J ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

PRESENT :—MR. JUSTICE P RAMAKRISHNAN

Messrs. Pharm Products Limited, Thanjavur and others . *Petitioners**

v.

The District Revenue Officer, Thanjavur, and others .. *Respondents.*

Medicinal and Toilet Preparations (Excise Duties) Act (XVI of 1955) *and Amendment Act (XIX of* 1961), *sections* 2 (a) *and* 3—*Schedule—Items* 1 *and* 2—*Rules* 9, 11 *and* 12 *and* 60 (3)—*Scope of—Preparations containing alcohol—Meaning of—Levy of excise duty on* ad valorem *basis—If discriminatory and if amounts to double taxation—Time-limit for levy of tax prescribed under rules* 9 *and* 11—*If applicable to cases where the manufacturer fails to comply with the terms of the Act and rules and escapes duty due to his fault*

The levy of an *ad valorem* duty on medicinal preparations containing alcohol as set out in the Schedule to the Medicinal and Toilet Preparations Excise Duties Act, 1955, as amended by Act XIX of 1961, is not discriminatory, either generally or as to the different rates of duty on the several items set out in the Schedule. The levy of an *ad valorem* duty on preparations containing alcohol, which does not satisfy the potability test, is based on a valid principle and the classification adopted thereunder is not capricious

(Object sought to be achieved by the levy explained—need for a deterrent check on preparations containing alcohol capable of misuse in the background of Dry Law enforcement explained)

The levy of such a duty does not amount to double taxation either. The fact that a tax on the alcoholic content of the tinctures or spirits was paid by the manufacturers of those tinctures has nothing to do with the manufacturers of the medicinal and toilet preparations who are sought to be taxed under the Act.

The duty leviable under the Act is on preparations containing alcohol The fact that alcohol went into solution in the preparations and was not directly added in them will not make any difference to the resultant position about the presence of alcohol in the product The goods of the description set out in the Schedule to Act will be liable for duty irrespective of the fact whether the alcohol was used directly or indirectly in the form of tinctures or spirits

(Scheme of the Act and its licensing provisions for manufacture 'in bond' or 'outside bond' explained)

The rule of limitation and the procedure for payment of or recovery of duty laid down in rules 6, 9 and 11 of the Rules framed under the Act will apply only to cases of manufacturers who take out a licence under the licensing provisions of the Act and the resultant goods are assessed to duty in the normal course with all the safeguards laid down in the Rules

Where a manufacturer fails to comply with the provisions of the Act and indulges in manufacture of dutiable goods he cannot take advantage of his own default and escape the liability to pay the duty Where goods which attract duty under the Act are manufactured and sold without paying the duty and the factum of such manufacture is discovered later by the authorities there is no period of limitation for the levy of the duty. To such cases the residuary provision in rule 12 will apply and under that rule there is no specific period of limitation A manufacturer who claims the benefit of the presumption under rule 60 (3) of the Rules relating to 'restricted preparations' is entitled to be heard before he is sought to be taxed and he should be given an opportunity to make his representations against the proposed levy

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*W P Nos 1030, 1092 to 1098 1139, 1155 and 1156 of 1964

24th January, 1967.

(Undue hardship in cases where the goods have been sold already and the duty payable has not been collected by the manufacturer and the goods are sought to be taxed retrospectively are to be relieved only by departmental authorities in proper cases)

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in R C No 22537/64 N 2, on the file of the District Revenue Officer, Thanjavur, and quash its order dated 3rd June, 1964, etc.

T Chengalvaroyan, K. Rajah Iyer and *K. Narayanaswami Mudaliar*, for Petitioners.

The Government Pleader, for Respondents.

The Court made the following

ORDER —These petitions were heard together because common questions of fact and of law arise in them for consideration They are filed by certain manufacturers of patent or proprietary medicines under Article 226 of the Constitution for writs in the nature of *mandamus* or *certiorari*, as the case may be In all these cases the respondents who are the Board of Revenue, Authorities of the Commercial Tax Department and the District Revenue Officer charged with the administration of the Medicinal and Toilet Preparations Excise Duties Act, 1955 (Central Act XVI of 1955) hereinafter called the Act, as amended in 1961 have, after calling for returns of their manufacture of patent and proprietary medicines since 1st June, 1961, when an amendment to the aforesaid Act was brought about under Act XIX of 1961, issued demands against the petitioners for payment of excise duty calculated *ad valorem* at 10 per cent of the value on the patent or proprietary medicines manufactured by them subsequent to 1st June, 1961.

The first contention of the petitioners in these cases, for challenging the correctness and validity of the above demand, was that under the Schedule to Act XVI of 1955, in item 1, under which the proposed levy of excise duty had been made, only preparations containing alcohol are liable to excise duty; but in the case of the preparations manufactured by the petitioners, except a single item called " Selvine" (manufactured by the petitioner in W P. No. 1139 of 1964) alcohol in its free state had not been used; but they had used " spirits, chloroform " or other tinctures containing alcohol in small quantities only as preservatives In such circumstances, bearing in mind the definition of alcohol given in section 2 (*a*) of the Act and also the general scope of the Act and the Rules the petitioners contend that it is illegal to consider that their preparations contain alcohol, and therefore liable to pay excise duty

In addition to this main plea which turns on the proper interpretation to be given to the use of the term " containing alcohol ", in the Schedule to the Act, the petitioners have also raised pleas that the levy in question is illegal because (1) it involves a double taxation on their products, (2) the levy is discriminatory, (3) the levy is barred by time and finally (4) that in any event, assuming that all the above mentioned points are decided against them, bearing in mind the presumption of law enunciated in rule 60 (3) of the Rules framed under the Act, the appropriate item of the Schedule under which they should have been assessed to excise duty will be item 2 and not item 1 In their counter affidavit, the Department traversed all these points and raised pleas contra. I shall refer to them at the appropriate stage in the course of this judgment

I will take up first for consideration the first plea mentioned above, that the preparations under consideretion do not contain alcohol as defined in the Act. The definition of alcohol in section 2 (*a*) of the Act runs :

" Alcohol means ethyl alcohol of any strength and purity having the chemical composition of C-2 H-5 OH "

It is admitted by the petitioners that in most of the products manufactured by them, they have used either spirits, chloroform, or tinctures of other substances,

only as preservatives. It was also admitted by them that on the labels affixed to their preparations, they have given in the formula used for the manufacture, the exact alcoholic content by volume. The words "spirits" and "tinctures" have recognised meanings in the pharmacopoeias Taking for example Bentley's Text Book on Pharmaceutics, "spirits" are defined as solutions of volatile substances in alcohol, and as such furnishing relatively stable solutions for distilling purposes. The British Pharmacopoeia Codex describes tinctures as alcoholic liquids containing in comparative dilute solution the active principle of vegetable drugs Both these definitions of the terms 'tinctures' and 'spirits' would show that they comprise necessarily solutions of other substances in alcohol The products manufactured by the petitioners are prepared adding spirits or tinctures to other drugs so as to form a mixture in the form of a solution Therefore, alcohol which has functioned as a solvent in the tinctures and spirits, has gone into state of further solution in the medicines prepared by the petitioners In other words, alcohol, though it might not have been directly added, is present in the medicines in a state of solution It has not undergone a chemical change into some other substance. It is present in a liquid form and the medicines thus prepared will reveal all the properties of alcohol, whether of smell or taste or capacity to vapourise, dependent of course, upon the quantity present A solution of sugar in water retains the properties of sugar including taste, a solution of salt in water retains the properties of salt including taste, and a solution containing coloured substance or substances having smell, retains the colour and smell, the going of a substance into the solution will still make it an ingredient present in the solution importing all its characteristics to the solution Therefore the fact that alcohol went into solution in these preparations as tinctures or spirits and was not directly added will not make any difference to the resultant position about the presence of alcohol as alcohol in the product In fact the position of alcohol in relation to the pharmaceutical products of the petitioners, as an ingredient in a state of solution is an *a fortiori* case, in the light of the decision of the Supreme Court in *Tungabhadra Industries Ltd.* v *Commercial Tax Officer*[1], where the Supreme Court held that Vanaspathi manufactured out of groundnut oil is still groundnut oil notwithstanding that in the manufacture of Vanaspathi, a chemical change has intervened by effecting an inter-molecular change in the composition of the oil, by the absorption of hydrogen atoms. I am, therefore, of the opinion that the medicines in this case are preparations which contain alcohol.

Before dealing with the other contentions of the petitioners I will briefly refer to the charging section which is section 3 of the Act, and it reads thus :

"*Duties of excise to be levied and collected on certain goods*—

(1) There shall be levied duties of excise, at the rates specified in the Schedule on all dutiable goods manufactured in India

(2) The duties aforesaid shall be leviable—

(*a*) where the dutiable goods are manufactured in bond, in the State in which such goods are released from a bonded warehouse for home consumption, whether such State is the State of manufacture or not;

(*b*) where the dutiable goods are not manufactured in bond, in the State in which such goods are manufactured

(3) Subject to the other provisions contained in the Act, the duties aforesaid shall be collected in such manner as may be prescribed"

Explanation—Dutiable goods are said to be manufactured in bond within the meaning of this section if they are allowed to be manufactured without payment of any duty of excise leviable under any law for the time being in force in respect of alcohol, opium, Indian hemp or other narcotic drug or narcotic which is to be used as an ingredient in the manufacture of such goods."

1 (1960) 11 S.T.C 827 : (1961) 2 S.C.R. 14 . (1961) 1 M.L.J (S.C.) 45 . (1961) 1 An W R (S.C.) 45 (1961) 1 S.C.J 272 . A.I.R 1961 S.C 412

The actual levy is made in accordance with the Schedule The Schedule prior to the amendment in 1961 read thus

Item No. (1)	*Description of dutiable goods.* (2)	*Rate of duty* (3)
1	Medicinal and toilet preparations, containing alcohol, which are prepared by distillation or to which alcohol has been added, and which are capable of being consumed as ordinary alcoholic beverages	Rupees seventeen and annas eight per gallon of the strength of London proof spirit.
2	Medicinal and toilet preparations not otherwise specified containing alcohol	
	(*i*) Ayurvedic preparations containing self-generated alcohol which are not capable of being consumed as ordinary alcoholic beverages	Nil.
	(*ii*) Ayurvedic preparations containing self-generated alcoholic, which are capable of being consumed as ordinary alcoholic beverages	Rupees three per gallon.
	(*iii*) All others	Rupees five per gallon of the strength of London proof spirit.
3	Medicinal and toilet preparations, not containing alcohol, but containing opium, Indian hemp, or other narcotic drug or narcotic	Nil.

After the amendment in 1961 the Schedule was recast thus

Item No. (1)	*Description of dutiable goods.* (2)	*Rate of duty* (3)
	Medicinal preparations	
1	Medicinal preparations, being patent or proprietary medicines, containing alcohol and which are not capable of being consumed as ordinary alcoholic beverages.	Ten per cent. *ad valorem.*
2	Medicinal preparations, containing alcohol, which are prepared by distillation or to which alcohol has been added, and which are capable of being consumed as ordinary alcoholic beverages	Rupees three and eighty-five naye paise per litre of the strength of London proof spirit
3	Medicinal preparations, not otherwise specified containing alcohol—	
	(*i*) Ayurvedic preparations containing self-generated alcohol which are not capable of being consumed as ordinary alcoholic beverages	Nil.

Learned Counsel Sri K Raja Iyer, Sri Chengalvaroyan and Sri Narayanaswami Mudaliar, appearing for the petitioners, referred to the provisions of the Act and the Rules and in particular, to section 3 (2) (*a*) and (*b*) extracted above, (which provide for manufacture in bond or manufacture outside bond), rule 20 and the licence in Form L-2 for supporting the argument that the words 'containing alcohol' in item 1 of the Schedule as amended in 1961, must necessarily refer to the direct use of free alcohol, and not alcohol used indirectly in the form of tinctures or spirits. Their argument is that the provision of the manufacture in bond and manufacture outside bond, must imply the direct use of alcohol as a dutiable preparation, but when it is used as a tincture or spirits, there is no question of paying duty on the tincture as such, or spirits as such and therefore the charging section will not apply. Rule 20 states that manufacture of medicinal and toilet preparations containing alcohol shall be permitted in bond without payment of duty as well as outside bond; in the case of manufacture in bond alcohol on which duty has not been paid shall be used under excise supervision and in the case of manufacture outside bond, only alcohol on which duty has already been paid shall be used Clause (3) in Form L-2 licence provided a condition limiting the quantity of spirit in the licensee's possession upto a certain quantity. According to the learned Counsel, these provisions also would show that the Act contemplated the use of alcohol directly in the course of manufacture for purposes of bringing the medicinal preparations within the scope of its levy, but it was not intended to levy excise duty on preparations in whose manufacture alcohol did not directly enter in its pure form but only as tinctures or spirits Reference was also made in this connection to the Preamble to the Act which states that it was intended to provide for the levy and collection of excise on medicinal and toilet preparations containing alcohol, opium etc It is urged that under the broad scheme of the Act thus expressed in the provision of the Act, the Rules thereunder as well as in the Preamble, the Act was intended to tax only preparations in whose manufacture alcohol directly was used, and not alcohol contained in tinctures or in spirits.

I am unable to accept this line of reasoning Section 3 (2) (*b*) of the Act, dealing with manufacture outside bond, is sufficiently general, to include the preparations in the present cases The provision contained for manufacture outside bond in rule 20 and also in clause (3) of L-2 licence are not exhaustive. They deal with safeguards where spirit as such is used, but they are not authority for the conclusion that a preparation containing alcohol comes into existence, only if alcohol in its free condition had been used but not as tincture or spirits The aforesaid rules are intended to safeguard the case of manufacture outside bond where alcohol in unmixed form is used But they will have no application where alcohol in tinctures or spirits is used in a preparation, the preparation will come within the category of preparations containing alcohol for the levy of excise duty on which the Act as well as the Schedule thereunder have made provision.

I will take up next the argument advanced by the learned Counsel for the petitioners under the heading 'double taxation' The argument of the learned Counsel is that tinctures have already suffered excise duty on their alcoholic component, and levy of excise duty on the medicines again will involve double taxation It appears to me that this is not a very clinching argument The scope of the Act is obviously to pass on the duty to the customers Further, the tax on the alcoholic content of the tinctures or spirits was paid by the manufacturers of these tinctures or spirits and not by the petitioners Therefore there is no question of double taxation so far as the petitioners are concerned Again, if in a given case the manufacturer used alcohol for manufacture on which he has paid duty, he can claim a rebate on such duty under section 4 of the Act I am of opinion that the attack made on the levy from the point of view of double taxation has no substance

I will take up next the attack made against the levy on the ground of discrimination Sri K Raja Iyer appearing for the petitioners has made a careful analysis of items 1 and 2 in the Schedule which I have already extracted above. He draws my attention to the point that the essential distinction between the two

items is what may be called for brevity "potability as beverage", the formula used for this purpose in the Schedule is "capable of being consumed as ordinary alcoholic beverage" According to the learned Counsel's submission, this ground of distinction has been relied on to make certain preparations, which are not potable as beverages and falling under Item 1, liable to 10 per cent *ad valorem* duty, and other preparations which are potable as beverages are liable to excise duty according to the alcoholic content calculated at Rs 3 85 per litre Learned Counsel also lays stress on the fact that in the Schedule to the old Act before the amendment there was no provision for such a duty levied *ad valorem* but only upon the alcoholic content by volume and this would be more in consonance with the purpose of the Act, namely, levy of excise duty on preparations containing alcohol. Learned Counsel also urges that the distinction on the basis of potability for levying *ad valorem* duty, is a distinction based on caprice without any reasonable basis to the object of the legislation He referred to the following observation found at page 596 of Willis Constitutional Law.

> "Another classification for taxation frequently used is one according to objects The Legislature has a wide discretion in this respect It may levy a tax on all houses, excluding barns, and on all horses, excluding sheep and cows However, any such classification must have some basis other than mere caprice A tax on white horses would be an illustration of a classification without basis"

He also referred to the amendment of the Schedule in 1963 and a further amendment in 1964 whereby uniformity as against item 1 and item 2, 10 per cent *ad valorem* or the rate based upon alcoholic content of the preparation whichever is higher, had been introduced By these amendments, it was urged, both items 1 and 2 were brought into a state of unformity but in the amendment of 1961 which governs the present case, that uniformity had not been attained, and there was discrimination in the method adopted for levying duty between items 1 and 2

As against this argument, the learned Government Pleader submits that under item 14 (E) of the Schedule to the Central Excise Act, there was already a provision for levying 10 per cent *ad valorem* excise duty on patent or proprietary medicines not containing alcohol, opium etc At the same time when the Medicinal and Toilet Preparations Act (XVI of 1955) was passed with the old Schedule which contained the "potability" test as well as a levy of duty based upon alcoholic content, several medicinal preparations which contained alcohol in small quantities which did not satisfy the "potability" test, and which were in all respects similar to patent or proprietary medicines falling under item 14 (E) of the Schedule to the Central Excise Act, were escaping levy of excise duty, and gaining an unfair advantage by reason of this lacuna in the legislation It was to get over this anomaly, that the amendment made in 1961 to Act XVI of 1955 introduced item 1 classification in the Schedule, imposing 10 per cent. *ad valorem* duty on preparations which contained alcohol as an ingredient but without the medicine being suitable for being used as an alcoholic beverage This argument appears to me to be a valid one for explaining the circumstances which led to the imposition of 10 per cent. *ad valorem* duty on preparations containing alcohol and which did not satisfy the "potability" test.

This apart, the "potability" test constituting a distinction between items 1 and 2, on a careful analysis, does not appear to be a capricious or absurd test like the distinction between a white horse and black horse, for the purpose of taxation to quote Willis On the introduction of the Prohibition Acts in various States, it became apparent that many preparations under the name of medicinal preparations were being put on the market but which were medicines only in a nominal sense, they were being bought up and consumed in large quantities by addicts to alcohol, valuaing them exclusively for their alcoholic content Customers of this kind will not care to buy medicines which contain only a trace of alcohol used as a preservative because such preparations would not readily help them to achieve their object of getting inebriated It was therefore considered to be a proper method to levy excise duty on preparations which contain alcohol and which are

potable in the sense of their being fitted for consumption as ordinary alcoholic beverages on a rate calculated upon the volumetric content of alcohol This appears to be a perfectly rational basis for drawing a distinction between item 1 and item 2 of the Schedule based upon their suitability or non-suitability for being used as ordinary alcoholic beverages. In item 1, stress is laid not so much on the value of alcoholic content as on the value of the medicines that go into their preparation. In item 2, the value of the medicines that go into the preparation may be little, when compared with the value of the higher alcoholic content that went into the preparation, and that has necessitated the levy on item 2 on the basis of the alcoholic content From this point of view there appears to be a valid basis of distinction between items 1 and 2 Again, when by the amendments in 1963 and 1964 *ad valorem* duty as an alternative to the duty based on the value of the alcoholic content was used for taxing both items 1 and 2 preparations, apparently a certain uniformity was introduced where such uniformity did not exist before, but still the provision even after such amendment, for the levy of the higher duty out of two alternative rates might have helped to lay stress in the case of item 2, on alcoholic content, and in the case of item 1 on the value of the medicines Further, it is not possible to say by merely looking at the Schedule, that item 1 will operate more oppressively than item 2. It may happen that a particular manufacturer may be able to sell large quantities of preparations which are being put into the market not so much for their medicinal content as for their alcoholic content, and seeing that the rate for item 2 is quite high, namely, Rs 3 85 per litre of alcohol, the actual duty in such cases may work out to more than 10 per cent *ad valorem* if calculated on the value of the medicinal consent alone I am, therefore, of the opinion that the argument based on discrimination is without substance

I will next deal with the argument on the question of limitation The relevant rules in this connection are rules 6, 9, 11 and 12 of the Rules framed under the Act, which read thus

"6 *Recovery of duty*—Every person who manufactures any dutiable goods, or who stores such goods in a warehouse, shall pay the duty or duties leviable on such goods under the Act, at such time and place and to such person as may be designated in, or under the authority of these Rules, whether the payment of such duty or duties is secured by bond or otherwise

9. *Time and manner of payment of duty*—(1) No dutiable goods shall be removed from any place where they are manufactured or any premises appurtenant thereto, which may be specified by the Excise Commissioner in this behalf, whether for consumption, export or manufacture of any other commodity in or outside such place, until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed in these Rules or as the Excise Commissioner may require

Provided that such goods may be deposited without payment of duty in a warehouse or may be exported out of India under bond as provided in rule 97:

Provided further that the Excise Commissioner may, if he thinks fit, instead of requiring payment of duty in respect of each separate consignment of goods removed from the place or premises specified in this behalf or from a warehouse keep with any person dealing in such goods an account-current of the duties payable thereon and such account shall be settled at intervals not exceeding three months, and the account-holder shall periodically deposit a sum therein sufficient in the opinion of the Excise Commissioner to cover the duty on the goods intended to be removed from the place of manufacture or storage

(2) If any dutiable goods are, in contravention of sub-rule (1) deposited in, or removed from, any place specified therein the manufacturer thereof shall pay the duty leviable on such goods upon written demand made by the proper officer, whether such demand is delivered personally to him or is left at the manufactory or his dwelling house, and he shall also be liable to a penalty to be determined

by the Excise Commissioner which may extend to two thousand rupees, and such goods shall also be liable to confiscation.

11. *Recovery of duties or charges short-levied or erroneously refunded* —When duties or charges have been short-levied through inadvertence, error, collusion or misconstruction on the part of an Excise Officer, or through mis-statement as to the quantity or description of such goods on the part of the owner, or when any such duty or charge, after having been levied, has been, owing to any such cause, erroneously refunded the person chargeable with the duty or charge, so short-levied, or to whom such refund has been erroneously made, shall pay the deficiency or repay the amount paid to him in excess, as the case may be, on written demand by the proper officer being made within six months from the date on which the duty or charge was paid or adjusted in the owner's account-current, if any, or from the date of making the refund.

12. *Residuary powers for recovery of sums due to Government* —Where these Rules do not make any specific provision for the collection of any duty, or of any deficiency in duty if the duty has for any reason been short-levied, or of any other sum of any kind payable to the collecting Government under the Act or these Rules, such duty, deficiency in duty or sum shall, on written demand made by the proper officer, be paid to such person and at such time, and place, as the proper officer may specify ."

These rules have to be read also with the Rules for the manufacture of preparations outside bond, contained in Section B of the Rules, namely, rules 46 to 58, as well as section 6 (1) of the Act and the licence in Form L-2 Under section 6 (1) of the Act, no person shall engage in the production or manufacture of any dutiable goods or of any specified component parts or ingredients of such goods except under the authority and in accordance with the terms and conditions of a licence granted under the Act Section 6 (2) says that every licence under sub-section (1) shall be granted for such area and for such period, subject to such restrictions and conditions, and in such form and containing such particulars as may be prescribed The licence in Form L-2 requires the manufacturer to describe the premises where the goods are to be manufactured Rules 46 to 58 in Section B provide for the conditions and safeguards under which the manufacture takes place outside bond It is against the background of the requirements of rules 46 to 58 that one has got to view the provision in rule 9, extracted above, that duty under the Act has to be ordinarily paid at the time of their removal from the place where they are manufactured or other premises as may be specified by the Excise Commissioner, for consumption, export etc. Rule 9 (2) provides for levy of duty where there is removal of the goods, in contravention of rule 9 (1), from the place where they are deposited, with a penalty for such illegal removal In the present case, the petitioners, though they had manufactured dutiable goods containing alcohol as found above, never cared to take a licence as required under section 6 (1) of the Act, with the consequence that all the restrictions and safeguards regarding manufacture of the products contained in rules 46 to 58 had been avoided by them in this case There was, therefore, no scope for levy of the duty either as provided under rule 9 or under rule 9 (2) Rule 11 which I have extracted above, deals with a limited set of contingencies as mentioned therein The first contingency is where there has been a short-levy because of inadvertence, error, collusion or misconstruction on the part of the Excise Officer; the second contingency arises where there is a mis-statement on the part of the owner as to the quantity or description of such goods There is a third contingency under rule 11, of erroneous refund, but we are not concerned with this Obviously in the present case there is no question of short-levy due to any of the acts or omissions attributed to the Excise Officer under the first contingency, nor is there a question of short-levy due to mis-statement as to the quantity or description by the owner under the second contingency What has happened, in fact, is a failure on the part of the manufacturer to pay duty due to his default in complying with the requirement of the Act after obtaining a licence under section 6 (1) and

after ensuring the manufacture of the goods within the safeguards contained in rules 46 to 58, with the result that the manufactured goods have not been assessed to duty as they should have been in the normal manner under rule 9 of the Rules In my opinion, it is rule 12 which one will have to look to, for finding the appropriate provision for levy of duty in this case Rule 12, which I have also extracted above, deals with cases where the Rules do not make any specific provision for the collection of any duty or of any other sum of any kind payable to the collecting Government under the Act The rules other than rule 12 do not contain any specific provision for a case where the manufacturer, due to his own default, fails to take a licence and fails to ensure the proper safeguards for the manufacture under rules 46 to 58 Had he done so, it would have ensured the levy of duty at the proper time and proper place But that does not mean that the goods which are dutiable under the Act should escape from duty due to the default of the manufacturer It is for such cases that rule 12 provides the appropriate power for levy, it being in the nature of a residuary power, as the heading itself states For the application of rule 12, there is no period of limitation A limitation of six months is provided only for rule 11, and I have already referred to the reasons which make me hold that is not a case where the question relates to the recovery of a duty or charge short-levied or erroneously refunded.

Learned Counsel for the petitioners referred to *M/s Chhotabhai* v *Union of India*[1], *Mewar Textile Mills* v *Union of India*[2], and the decision Srinivasan, J , in *A Peria Nachimuthu Goundar* v *Assistant Collector of Central Excise, Coimbatore*[3] Each one of these cases deals with a particular situation where it was not possible to levy the appropriate duty on certain goods in the manner provided by the earlier provisions in the Rules, like rules 9, 11 and so on, and it was held that a levy under rule 12 (or rule 10-A which is the corresponding provision under the Central Excise Act) could be levied Thus in the Supreme Court decision in *M/s Chhotabhai* v. *Union of India*[1], an additional duty was leviable under a later enactment which was directed to have retrospective effect and therefore the levy could not be made under rule 9 or the other provisions of the Rules and the residuary provision under rule 10-A under the Central Excise Act was held to be applicable Before Srinivasan, J , in *A Peria Nachimuthu Gounder* v *Assistant Collector of Central Excise, Coimbatore*[3], it was discovered as a result of a subsequent finding arrived at by the department, that the two mills, though they were nominally in the names of different persons, really belonged to a single manufacturer and this required a further payment of excise duty for which a demand was made under the residual provision in rule 10-A of the Central Excise Act The learned Judge held that rule 10-A would cover such a case In *Mewar Textile Mills* v *Union of India*[2], by reason of the retrospective operation of an Act, additional duty was found payable in respect of goods which had been already cleared without payment of duty in the ordinary way at the time of clearance, it was held that the residual provision in rule 10-A would apply. Learned Counsel for the petitioners argued that these decisions would show that the proper situation to apply the residual provision, will be where a subsequent amendment of the laws in force made it necessary to collect an extra duty which was not collectable under the law in force at the time of the actual removal of the goods, and therefore, the residual provision cannot apply to a case like the present where liability to pay a duty under a later enactment is not relied upon, but only a failure on the part of the department to collect the legitimate duty from the manufacturers at the time when the goods were removed from the place of manufacture the law in force having continued to be the same at all material times I am of opinion that the decisions do not provide an exhaustive list of all the cases or situations where the residual provision can be applied They should be considered only as illustrative of certain situations What we have in this case is a situation, where owing to the default of the manufacturer, he failed to take a licence and failed to pay the duty at the appropriate time and place Later on, the department

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1 A I R 1962 S C 1006
2 A I R 1955 Raj 114.
3 W.P Nos 125 and 126 of 1961.

found out the omission on the part of the manufacturer to comply with the Rules and called upon him to pay the required duty It appears to me that such a demand will fall under the residuary power in rule 12, and therefore the provision about limitation contained in rule 9 will not apply.

I will now consider a final argument of the petitioner's learned Counsel which appears to have a great deal of substance, and which is based upon the presumption in rule 60 (3) of the Rules as amended on 18th June, 1960 :

> " 60. *Maintenance of restricted list of preparations.*—(1) A list of medicinal and toilet preparations which are considered as capable of being misused as ordinary alcoholic beverages, hereinafter referred to as restricted preparations, is given in the Schedule All other medicinal preparations being manufactured from a date prior to 1st April, 1957 shall be considered to be not capable of being misused as ordinary alcoholic beverages (hereinafter referred to as unrestricted preparations).
>
> (2) If, however, a preparation falling in the unrestricted category is found to be widely used as ordinary alcoholic beverage, the Central Government may on the request of a State Government or *suo motu* refer the matter to the Standing, Committee referred to in rule 68 The Central Government shall declare the preparation as a restricted preparation, if so advised by the said Committee and thereupon include the said preparation in the Schedule
>
> (3) Medicinal preparations other than official allopathic preparations and toilet preparations which are manufactured in India for the first time on and subsequent to 1st April, 1957 shall be presumed to be restricted preparations unless declared to the contrary by the Central Government on the advice of the Standing Committee Any manufacturer intending to produce a new alcoholic preparation other than an official allopathic preparation, shall submit two samples of such preparation with the recipe to the State Government The State Government shall forward such request with recipe to the Central Government for a decision The Central Government shall refer the matter to the Standing Committee and in accordance with the advice tendered by it declare the category in which the preparation should be placed. The decision of the Central Government shall be communicated to all State Governments. In case the preparation is declared to be a restricted preparation it shall be included in the Schedule
>
> The advice of the Standing Committee shall be communicated within a reasonable time and in no case later than six months from the date of submissoin of sample to the Committee."

A majority of the preparations in the present cases were manufactured after 1st April, 1957 In their cases, a presumption will arise under rule 60 (3) that they are restricted preparations Rule 2 (*xix*) defines " restricted preparation " as .

> " 'restricted preparation ' means every medicinal and toilet preparation specified in the Schedule and includes every preparation declared by the Central Government as restricted preparation under these Rules "

This definition read with rule 60 (1) would show that a restricted preparation is one which the Government have considered after adopting the prescribed procedure and after taking the advice of the Standing Committee, to be capable of being misused as ordinary alcoholic beverages In the present case also the petitioners want to rely on the presumption contained in rule 60 (3) that since their preparations have not been declared to be unrestricted by the Central Government on the advice of the Standing Committee, such of their preparations manufactured after 1st April, 1957 shall be presumed to be restricted and therefore capable of being misused as ordinary alcoholic beverages It is urged by them that they could take advantage of this presumption, and claim that such preparations fall under item 2 of the Schedule already mentioned, for the purpose of being assessed to excise duty on the basis of the alcoholic content They also referred to an opinion given by a former Member of the Board of Revenue, Sri S K Chettur, which is marked as

Exhibit B in W P. No 1139 of 1964, and also a reply given by another former Member of the Board of Revenue, Sri C A Ramakrishnan in answer to a memorandum from the Honorary Secretary, Pharmaceutical, Chemical and Allied Manufacturers Association, on 6th October, 1964 These communications indicate that in the view of these authorities of the Revenue Department where particular manufacturers do not obtain a declaration to the contrary by the Central Government in respect of preparations manufactured after 1st April, 1957, there shall be a presumption about their being restricted, and with the consequent liability to pay excise duty under item 2 As against this, the learned Government Pleader contends that what the aforesaid rule 60 (3) lays down is only a presumption, that such presumption can be rebutted by contra evidence, and that if the petitioners want to take advantage of the presumption thus claimed, the department also should be given an opportunity to afford contra evidence to rebut the presumption and also to establish that the preparations in question are not really capable of being consumed as ordinary alcoholic beverages But no decision can be given by this Court on these rival contentions while dealing with the matter in a proceeding for the issue of a writ under Article 226 of the Constitution, because such decision requires an anlysis of data and also taking evidence, if necessary These necessary steps before a decision can be arrived at should necessarily be delegated to the authorities who are charged with the duty of considering the representations by the manufacturers and passing appropriate orders on those representations in the light of the law. It is also mentioned by the learned Government Pleader that against the decisions of the assessing authorities, appeals are provided under the Act and the Rules, to higher tribunals or departmental authorities and the petitioners can obtain adequate relief by resort to these provisions On the other hand, what the petitioners really feel aggrieved about in the present case is due to a two-fold cause. One is, that even though the amendment to the Act came into force in 1961 and they had submitted returns promptly when the department called for such returns, they were given no opportunity to put forward the proper representations as against the proposed levy at any time, and that they were suddenly faced with the demand by the authorities for payment of the duties calculated *ad valorem* on the nature of the medicines as if they were products containing alcohol, to be assessed under item 1 of the Schedule. They had no opportunity of meeting this demand by adducing adequate data both regarding the presumption above mentioned as well as the dates of the manufacture of the goods The second cause of grievance is stated to be that by the time these demands were made, they had sold their products, and that if they are now asked to pay duty with retrospective effect, it would make a deep cut into their profits, especially if the 10 per cent *ad valorem* duty is to be made payable It appears to me that both these representations one from the point of view of want of proper opportunity and the other from the point of view of the undue hardship which may be caused to the petitioners by making a demand retrospectively long After the Amending Act was passed, are matters which should be properly considered by the appropriate authorities Necessary relief has to be given to them under Rules in regard to the first contention about the benefits they would be entitled to get under the presumption in rule 60 (3) The second contention is a matter which the administrative authorities will have to consider in their discretion and decide whether there should be any waiver of duty in these cases, because of the long delay in making the demand and also because the petitioners had long ago sold out their goods without adding the burden of the duty to the prices charged to the customers, and also bearing in mind the fact that the higher authorities of the Department had at one time taken a view which would imply that the products were to be treated as restricted preparations with a liability to pay duty under item 2 of the Schedule at Rs. 3 85 on the volumetric content of alcohol In view of the above considerations I allow the writ petitions (other than W P. Nos 1093, 1095, 1098 and 1156 of 1964) and quash the orders making demands for the payment of the duty It will be open to the authorities to call upon the petitioners to show cause against the levy of the duty, and proceed to make the proper levy after hearing their representations contra and in the light of the observations above mentioned in this judgment

The excepted writ petitions, W P Nos 1093, 1095, 1098 and 1156 of 1964 are directed against the demand of the authorities against the petitioners asking them to take out L-2 licences on the ground that the preparations manufactured by them contain alcohol and therefore licences are necessary under section 6 (2) of the Act. In view of my above decision that the preparations do contain alcohol the writ petitions filed against the demand for taking out L-2 licences, have to be dismissed and they are hereby dismissed There will be no order as to costs

R M — *Orders accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE T RAMAPRASADA RAO

S Attendrooloo Chetty's Charities by its president and trustees, S Venkatarangam and others .. *Petitioners**

v

M/s Sadhana Aushadalaya by its proprietor Naresh Chandra Ghose .. *Respondents.*

Madras Buildings (Lease and Rent) Control Act (XVIII of 1960), *section* 4 (2) (b) (ii) *and rule* 13—*Fixation of fair rent—Amenities under rule* 13—*Value of site—Buildings having more than one floor—Principle of apportionment—Jurisdiction to reduce ren in an application for fair rent by landlord*

Words and Phrases—' Site.'

Whether the premises is a residential building or a non-residential building, it is imperative, while arriving at the total cost of the building, to take into consideration the market value of that portion of the site on which the residential or non-residential building is constructed In the case of buildings having more than one floor the principle ought to be one of apportionment in accordance with the number of storeys If there are two storeys, the market value of the land for the first floor will be half If there are more than two storeys, it will be proportionately distributed in accordance with the number of storeys in the building.

' Site ' means the general locale upon which the house is built The modern concept of a house or tenement has acquired a secondary signification. It includes also a flat So, where there is a building which has two or more storeys, each flat or storey is a building The ' site ' in so far as a flat or storey is concerned, is that on which a flat or storey immediately is superimposed or stands. No doubt, the flat gains support from the things below it, including the ground. But it cannot be said that the expression ' site ' in section 4 (2) (*b*) (ii) or in section 4 (3) (*b*) (ii) would mean always the ground on which the totality of the building has been constructed Thus interpreted, the ' site ' in so far as the ground floor is concerned, would be the site as ordinarily understood and on which the ground floor stands, but the 'site ' with reference to the first, second or the nth floors, would mean that portion of the building on which the respective flat or storey is built upon or imposed.

It cannot be said that in an application by the landlord for fixation of fair rent, the Courts cannot reduce the rent already paid by the tenant. In an application of the kind above, such risks are necessarily involved

Held, on the facts, that in regard to a building situated in Broadway, Madras the majority of the amenities contemplated in Rule 13 of the Madras Buildings (Lease and Rent Control) Rules, 1961, are also available The provision of ten per cent as allowances towards such amenities appear to be meagre The Act provides for a maximum of 25 per cent In the instant case fifteen per cent. of the cost of construction as calculated in the manner prescribed may reasonably be allowed as allowances for this particular building

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* C R P Nos 551 and 632 of 1965 27th February, 1967.

Petition under section 25 of Act XVIII of 1960 praying the High Court to revise the order of the Small Cause Court, in H R A No 494 of 1964—H R.C. No 494 of 1963, Rent Controller, Madras, etc

P Venkataswamy, S Gopal, C Sudarasana Srinivasan, V. M Sadasivam and *P S Ramachandra Ayyar,* for Petitioners

M R Kini and *C P Venugopal,* for Respondent

The Court made the following

ORDER —The landlords in the former case and the landlady in the latter case are the petitioners, being dissatisfied with the order of the appellate authority under the Madras Buildings (Lease and Rent Control) Act, 1960, hereinafter called the Act, in the matter of the fixation of fair rent for the portions in the occupation of their respective tenants, have come up to this Court to revise the order of the appellate authority

In C R P. No 551 of 1965, the petitioners are the Board of Trustees in management of S Attendrooloo Chetti's Charities The tenant is Sadhana Aushadhalaya, occupying the ground floor of premises No 17-A, Broadway, Madras The landlord filed an application under section 4 of the Act for fixation of fair rent for the portion in its occupation which consists of an office hall and a bathroom-*cum*-dressing room with other amenities therein The Rent Controller fixed the rent at Rs. 300 The appeal by the landlords was dismissed by the appellate authority The landlords having come up in revision, have rested their contentions on the following two grounds (1) the apportionment of the value of the site between the first and the second floors of the building is not strictly in accordance with law and (2) the ten per cent provided by the Courts below as and towards amenities is too low and they are entitled to the maximum of 25 per cent

In C R P No 632 of 1965 the main contentions are (1) the Court below has no jurisdiction to reduce the rent which the premises was already fetching, while enquiring into a petition for fixation of fair rent, and (2) the apportionment of the value of the site in equal proportions between the first and the second floors is not in accordance with law.

It may be noted that the petitioners before me did raise in the grounds of revision many other contentions But they are purely factual in nature and findings of fact having been rendered by the Courts below on such other points raised in the grounds of revision I am unable to interfere with the same In fact, they were not even seriously pressed before me I am therefore considering the most important question as to whether the apportionment of the value of the site on which the entirety of the building stands between the two floors of the building is a principle which is correct In C R P No 551 of 1965 Sri P Venkatasawami, learned Counsel for the petitioners, also stressed before me that the ten per cent. provided for as and towards amenties as against the maximum statutory percentage of 25 is inequitable and has to be reconsidered.

Section 4 of the Act lays down the principles for the fixation of fair rent It also prescribes certain other guiding rules as well for the ultimate quantification of such fair rent Whether the premises is a residential building or a non-residential building, it is imperative, while arriving at the total cost of the building, to take into consideration the market value of that portion of the site on which the residential or non-residential building is constructed In the case of a residential building six per cent gross return per annum on the total cost of the building shall be deemed to be the fair rent. In the case of non-residential building, nine per cent gross return per annum on the total cost of the building shall be deemed to be the fair rent As I have stated, the total cost referred to in section 4 (2) (*a*) and 4 (3) (*a*) of the Act, includes the actual cost of construction which again has to be arrived at in accordance with the guiding rules and principles laid down in the Act and the Rules framed thereunder It should also be noted that additional allowances can also be made for considerations such as the locality in which the

building is situate, features of architectual interest, accessibility to market, nearness to railway station or educational institution and such other amenities as may be prescribed ; in the case of a non-residential building, the purpose for which a non-residential building is used is also one of the considerations that can be taken into account In C R P No 551 of 1965, the building is a non-residential one In C R P. No. 632 of 1965, the premises is a residential one

The more important question, therefore, for consideration is, what is the meaning of the expression, " the market value of that portion of the site on which the building is constructed " "Site" means the general locale upon which the house is built Sir George Jessel, M.R. in *Yorkshire Fire and Life Insurance Co* v *Clayton*[1].

" Formerly, houses were buildings so that each house occupied a separate site, but in modern times a practice has grown up of putting separate houses one above the other They are built in separate flats or storeys, but for all legal and ordinary purposes they are separate houses Each is separately 'let and separately occupied, and has no connection with those above or below, except in so far as it may derive support from those below instead of from the ground as in the case of ordinary houses "

This observation is of universal application The modern concept of a house or tenement has acquired a secondary signification It includes also a flat So, where there is a building which has two or more storeys, each flat or storey is a building This also gains support from the definition given to the word ' building' in section 2 (2) of the Act, which provides

" ' building ' means any building or part of a building"

Therefore, what is the site on which the first, second or the storey of a composite or a large building stands ? In re *Feeney Inglis* v *Mayor and Co of Birmingham*[2], Eve, J , had to interpret the word 'site' appearing in a testament There, a testator, by his will, bequeathed a sum of money to the Birmingham Corporation to be applied by them towards the cost of erecting an art gallery on a ' site ' to be provided by the Corporation The following passage in that judgment, referred to also in Roland Burrows' ' Words and Phrases ' gives a very clear interpretation of what the word ' site ' means .

" The executors . . contend that what the testator contemplated was a separate building erected and directly resting on a plot of land to be provided by the Corporation, and they insist that the word ' site ' means the ground upon which the building has been or is to be erected, and cannot be read as applicable to an artificial house upon which the new erection is to be superimposed The Corporation, on the other hand, argue that, although the word ' site ' may as a general rule be held to refer to an area on the ground level, it is not confined to that level and does under some circumstances signify the superficial space on which the building stands, even though that space be at a higher level than the ground level.. The question, therefore, is whether the word ' site ' so necessarily imports an area or plots of land as to preclude its being judicially applied to a superficial area which includes no land or ground as popularly understood I have looked again at all the dictionary quotations to which my attention has been called, and having given the best consideration I can to what was urged on both sides, I have come to the conclusion that I ought not to attach to the word the restricted meaning for which the executors contend "

The word ' site ' appears in section 14 (1) (*b*) of the Act Natesan, J , had occasion to consider the meaning of this word in *R Sundaram* v *A D Peter*[3] The learned Judge expressed his opinion thus

" The word ' site ' can have an extended as well as a restricted meaning But the dictionary meaning of ' site ' includes the place or position occupied by some

1 8 Q B D 421 at 424
2 24 T L R 314
3 (1966) 1 M L J 342

specified thing If a shed is a building under the Act then the terrace on which it stands will be the 'site' as used in section 14 (1) (*b*) of the Act The word 'site' does not necessarily mean only the ground but could also include in certain circumstances an artificial base on which a new erection is to be superimposed "

Maxwell on "The Interpretation of Statutes", 11th Edition, states at page 58:

"It is in the interpretation of general words and phrases that the principles of strictly adapting the meaning to the particular subject-matter with reference to which the words are used finds its most frequent application However wide in the abstract, they are more or less elastic, and admit of restriction or expansion to suit the subject-matter. While expressing truly enough all that the Legislature intended, they frequently express more in their literal meaning and natural force; and it is necessary to give them the meaning which best suits the scope and object of the statute without extending to ground foreign to the intention It is, therefore, a canon of interpretation that all words, if they be general and not express and precise are to be restricted to the fitness of the matter "

If therefore the subject-matter with reference to which the word is used can be taken into consideration while interpreting a general word, then an elastic or restricted meaning can be attributed to such a word so as to advance the remedy provided for by the statute The Act being of a remedial nature, it is pre-eminently necessary that the words therein contained should be liberally interpreted so as to bring out the real import of the same and give to the persons concerned the benefit intended by such legislation I have also referred to the modern concept of a house which includes a flat It therefore follows that the 'site' in so far as a flat or storey is concerned, is that on which a flat or a storey immediately is superimposed or stands No doubt, the flat gains support from the things below it, including the ground But it cannot be said that the expression 'site' in section 4 (2) (*b*) (ii) or in section 4 (3) (*b*) (ii) would mean always the ground on which the totality of the building has been constructed Thus interpreted, the 'site' in so far as the ground floor is concerned, would be the site as ordinarily understood and on which the ground floor stands; but the 'site' with reference to the first, second or the nth floors, would mean that portion of the building on which the respective flat or storey is built upon or imposed; but it should not be forgotten that the weight of the storey or the flat concerned is borne not only by that on which such structure is superimposed, but also, to a considerable extent by the ground on which the entire building stands There can be no dispute that every flat or storey of any building derives support from that below it as also from the grounds on which the building stands

Having thus far considered the meaning of the word 'site', the question still remains as to how best to implement the express words of the statute provided for in section 4 (2) (*b*) (*ii*) or section 4 (3) (*b*) (*ii*) of the Act The Act makes it obligatory that to arrive at the total cost, the market value of that portion of the site on which the residential or non-residential building is constructed, has to be taken into consideration Therefore, if a building consists of more than one storey, how is the market value of that portion of the site in each case to be evaluated ?

In *Namasivaya Chettiar* v *Appuswamy Iyer*[1], Anantanarayanan, J , (as he then was) observed as follows —

"But since, for the purpose of the Act, the actual plinth area upon which the construction concerned stands, has to be taken into account, and a strict interpretation of this will mean that the plinth area for the first floor, as distinguished from the ground floor, must be assessed as 'nil' value, it appears to me that some such expediency as that actually adopted in the case is inevitable "

The expediency referred to by the learned Judge is the formula adopted by the Court below which is to the following effect, the fair rent is sought to be fixed with reference to the first floor of the building, and for purpose of computation of such fair rent, the Court below has adopted a formula of taking the plinth area of the

1. C R P No 486 of 1964.

first floor as half the actual area upon which the construction was erected In *Vasantha Watch Co* v *Saraswathi Time Equipment*[1], the same rule was adopted by the learned Judge In this case also, the following observations are apposite —

" I am unable to hold that the Courts below were in error in taking the area of the floor for computation purposes as half of the plinth area; otherwise, and if the letter of the rules has to be adhered to, there would be no floor area at all for the simple reason that this is the first floor of the building, and not the ground floor."

I respectfully agree with the principles adopted by the learned Judge I am also of the view that in the case of buildings having more than one floor the principle ought to be one of apportionment in accordance with the number of storeys If there are two storeys, the market value of the land for the first floor will be half If there are more than two storeys, it will be proportionately distributed in accordance with the number of storeys in the building If a literal interpretation were to be given to the meaning of the Act, it would either result in a conclusion that there is no site for the first, second and the nth storey at all which has to be considered, or taking the extreme view, such value of the site below has to be added on to each of the storeys in the building Such addition of the value of the site to each of such storeys would, in my opinion, result in unjust enrichment to the landlord or the landlady, which has to be relieved against, bearing in mind the beneficial aspect of the Act. I am therefore of opinion that the principle adopted by the lower Court in apportioning the value of the site as between the two storeys in both the Civil Revision Petitions is well founded.

In C R P No 551 of 1962, the additional question arises whether the ten per cent provided for as and towards amenities is just and proper It is not to be forgotten that Broadway is a principal arterial road in the city which is as important as any other important road but for the length and breadth Its prominence cannot be lightly brushed aside The Act itself provides for allowances being made for consideration of locality in which the building is situate, accessibility to market, nearness to railway station etc. The majority of the amenities contemplated in rule 13 of the Madras Buildings (Lease and Rent Control) Rules, 1961, are also available. In my opinion, the provision of ten per cent as allowances towards such amenities appears to be meagre. The Act provides for a maximum of 25 per cent I should think that in the instant case fifteen per cent of the cost of construction as calculated in the manner prescribed may reasonably be allowed as allowances for the considerations aforesaid for this particular building C R P No. 551 of 1965 is therefore partly allowed and is remitted back to the Rent Controller for working out and fixing the actual rent payable by the tenant to the landlord. C R.P No. 632 of 1965 is dismissed as there is no substance in the other contention that in an application for fixation of fair rent, the Court cannot reduce the rent already paid by the tenant In an application of the kind above, such risks are necessarily involved. There will be no order as to costs in both the Civil Revision Petitions.

S V J. *Orders accordingly.*

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1. C.R.P. No. 583 of 1964.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTCE K S RAMAMURTI AND MR JUSTICE A ALAGIRISWAMI.

Rajagopal Pillai and others .. *Appellants**

v.

Pakkiam Ammal and another .. *Respondents*

Evidence Act (I of 1872), *section* 114—*Presumption of marriage—Cohabitation between man and woman for long time—Conclusiveness—Presumption regarding performance of requisite ceremonies*

Hindu Law—Joint family—Blending—Scope of—Release or renunciation by coparcener—Effect of—Division in status—When effected

Transfer of Property Act (IV of 1882), *section* 6 (*a*)—Spes successionis—*Release of one's right to a claim on the basis of blending in future—Validity of*

Deed of release—Interpretation of.

The marriage state being the chief foundation on which the superstucture os society rests, presumption of the marriage arising from cohabitation of spouses is a very strong presumpiton. Where a man and a woman had lived together af man and wife, the law will presume, until the contrary is proved, that they were living together by virtue of a legal marriage and not in concubinage [illegible]

The presumption of law is the strongest of legal presumptions and is not lightly to be repelled by a mere balance of probabilities and the evidence repelling that presumption must be strong, distinct and satisfactory Every intendment is made in favour of a marriage *de facto* and the more distant, the date of the marriage, the more readily is the presumption drawn, based upon cohabitation and repute. The weight of the presumption gets strengthened when it is proved that the party whose marriage is in question distinctly intended to marry and went through a form of marriage with that intention and also subsequently lived together as man and wife and were esteemed and reputed as such by those who knew them. The presumption still exists, even when there is no positive evidence of any marriage having taken place The presumption is not only with regard to the factum of the marriage, but also with regard to the performance of the requisite ceremonies to constitute a valid marriage

When once it is proved that the marriage was performed the presumption arises that it is valid in law and that the necessary ceremonies had been performed, unless evidence to the contrary is adduced that the necessary ceremonies were not performed. If there has been a blending by the father of his self-acquisitions, it would only mean that the father has abandoned his separate rights in favour of all the coparceners who constituted a joint family. Hindu Law does not permit a blending so as to impress upon the separate properties the character of joint family properties confining that right to some only of the coparceners in the family. The doctrine of blending is a peculiar doctrine under Hindu Law and blending can be only in favour of the entire body of coparceners

The release or renunciation, though in form is in favour of one of the members of the joint family and not in favour of the rest of the members of the joint family as a unit, it has been held that in law it should be regarded as a renunciation in favour of the entire body on the reasoning that the legal effect of renunciation is extinction and reduction of the number of members to whom shares would have to be allotted if and when a division takes place.

The renunciation by a coparcener of his interest in the joint family property makes him a divided member from the rest The principle on which such a renunciation is said to have the effect of bringing about a division in status is that when a person is a member of the joint family, he is joint in estate, mess and worship with the rest of the members of the joint family and when he renounces

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* Appeal No. 204 of 1961. 12th April, 9[illegible]7.

his interest in the joint family properties, there is thereafter no jointness in estate between himself on the one hand and the other members of the family on the other. The essential condition of jointness in estate no longer subsists and necessarily a division in status takes place. When once the community of property between the releasor and the rest of the family stood severed, the legal consequence is that he ceased to be a member of the joint family Such a renunciation will have the legal consequences of bringing about a division in status only if there is renunciation of his interest in the joint family properties In other words, if at the time of the release or renunciation, there are no joint family properties, the release will not have the effect of bringing about a division in status.

It is well settled rule of interpretation of deeds of release that, however wide and general the covenant of release may be, its operation must be restricted to the rights which are in the contemplation or in controversy between the parties and would not cover or comprehend rights which are never in the minds of the parties at that time

A release of one's right to a claim on the basis of a blending in future, is void and inoperative as it amounts to a release of a mere *spes successionis* or the right to a chance of a legacy, coming within the mischief of section 6 (*a*) of the Transfer of Property Act (*Held* on facts, such a precarious right resting upon the hope of a future blending, depending upon the sweet will and pleasure of Annavi, is nothing more than a *spes successionis*, and the law does not permit a transfer or release of such rights)

Appeal against the decree of the Subordinate Judge of Tiruchirappalli, dated 29th March, 1961 and passed in Original Suit No. 152 of 1960.

R Gopalaswami Ayyangar, P. S. Srisailam, P S. Narasimhan and *P. Raghaviah*, for Appellants.

V. Vedantachari for *G Ramanujam* and *V Ramaswami*, for Respondents

The Judgment of the Court was delivered by

Ramamurti, J—This appal arises out of a suit, Original Suit No 152 of 1960 filed by respondents 1 and 2 herein for partition and separate possession of their 1/6th share in the properties specified in Schedules A to C attached to the plaint. Annavi, is the fifth defendant in the suit and his sons who are now alive are defendants 1 to 4 Annavi had a son by name Arumugham who died in 1954 The first plaintiff, Pakkiam Ammal has filed the present suit for partition claiming to be the legally wedded wife of this Arumugham, her marriage having taken place in 1943 The second plaintiff is their daughter born in June, 1945 The case of the first plaintiff is that her husband Arumugham and the defendants, her father-in-law and brothers-in-law, constituted members of a joint Hindu undivided family, that all the properties involved in the suit are joint family properties, that her husband and the plaintiffs were living with the defendants in the family house at Manapparai and that even after the death of Arumugham the plaintiffs continued to be with the defendants 1 and 3 to 5 at Manapparai, that all throughout from the time of her marriage in 1943 she was acknowledged and treated as the legally wedded wife of Arumugham, that her daughter was also acknowledged and treated as their legitimate daughter by all the members of the family, that the fifth defendant was particularly attached towards the second plaintiff, that the defendants brought up the second plaintiff just like the other children in the family, that they put her in the school and that the relationship was throughout friendly and cordial till the middle of 1959, when misunderstandings arose consequent upon the first plaintiff not acceding to the proposal of defendants 1 to 5 that her daughter, the second plaintiff, should be married to one Sachidanandam, the wife's brother of the first defendant who was aged about 40 years The first plaintff's further case is that consequent upon these misunderstandings, she and her daughter were driven out of the family house in the middle of October, 1959 resulting in the present suit for partition and allotment of 1/6th share of her husband under the Hindu Women's Rights to Property Act and also for suitable provision for maintenance and marriage expenses of her

daughter In 1959, the father Annavi Pillai had executed a release deed taking some properties for himself and relinquished his interest in the rest of the properties and one month later in July, 1959, a partition evidenced by a registered deed was effected between the four brothers, defendants 1 to 4 The plaintiffs have attacked these transactions as fraudulently brought about to defeat their rights.

The defendants resisted the suit questioning the status of the plaintiff as the legally wedded wife of Arumugham They even went to the extent of alleging that the first plaintiff was living a life of prostitution and the second plaintiff is the offspring of such prostitution The substance of their defence is that this Arumugham did not prosecute his studies properly was leading wayward life, getting out of the control of the father, left the family house and to eke his livelihood, he has been going to various places like Madura, Kattuputhur, Muthupet, etc , etc., that again when he came back to the father in 1944, he executed a release deed on 10th November, 1944 receiving a sum of Rs 500, that under that release deed, this Arumugham had relinquished all his rights and that Arumugham was not entitled to any rights in the suit properties at the time of his death in 1954. Their further case is that the properties were originally the self-acquired properties of the father, the fifth defendant, that they became joint family properties as a result of blending and that when Arumugham himself had no rights in the properties, the plaintiffs cannot claim any right.

The trial Court on a consideration of the oral and documentary evidence held that Arumugham married the first plaintiff in 1943, that even though Arumugham had been shifting from place to place, he continued to be a member of the joint family, that all the members of the family and friends and relatives acknowledged and treated the first plaintiff as the legally wedded wife of Arumugham and the second plaintiff as their legitimate daughter and that even after Arumugham's death in 1954, plaintiffs 1 and 2 lived with the defendants in the family house, they being treated just like any other member or members of the family and that it was only in 1959 that on account of misunderstandings arising out of the marriage proposal of the second plaintiff that plaintiffs were driven out of the family house For reasons not quite intelligible, the trial Court took the view that as the original of Exhibit B-3, the release deed executed by Arumugham in favour of the fifth defendant, was not produced, the said release would not operate to deprive Arumugham and the plaintiff's their rights in the family properties Ultimately the trial Court granted in favour of the first plaintiff, a decree for partition of her 1/6th share in the A and B Schedule properties and items 2, 3 and 4 of the C Schedule. The precise basis on which the first plaintiff's 1/6th share was upheld is not quite clear from the reasoning of the trial Court except that it has accepted the plaintiff's case that the properties are all joint family properties Hence the present appeal by the defendants.

The fifth defendant, the father, died in 1963 during the pendency of the appeal and his legal representatives have been brought on record

From the above narration of facts, it will be seen that the three main points which arise for consideration in the appeal are

1. Whether the first plaintiff Pakkiam Ammal is the legally wedded wife of Arumugham

2 Whether the suit properties are the self-acquired properties of the fifth defendant or the joint family properties of the father and sons and if former when did they become joint family properties What is the effect of the release deed executed by Arumugham in 1944 in regard to the suit properties ? and

3 Whether at the moment of Arumugham's death he had any interest in the suit properties along with his father and brothers

On the first point, we may mention even at the outset that the appellants have totally failed to make out that the first plaintiff Pakkiam Ammal is not the legally wedded wife of Arumugham We have no hesitation in holding that the finding

arrived at by the trial Court is correct, supported by ample and satisfactory oral and documentary evidence We are of the view that the evidence adduced by the plaintiffs is overwhelming as against the worthless evidence adduced on the side of the defendants who in questioning the status of the first plaintiff were only exploiting her helplessness taking advantage of the fact that the marriage took place about 20 years prior to the suit and that too at Madurai and not at Manapparai, the place of residence of both the parties The defendants are unscrupulous persons and they even went to the extent of making utterly irresponsible scurrilous allegations that the first plaintiff was leading the life of prosítution and the second plaintiff was born of that prostitution No attempt whatsoever was made and no evidence of any kind whatsoever was adduced in the trial Court in support of this outrageous pleading The conduct of the members of the family themselves, all of them, as we shall presently refer to, shows beyond all shadow of doubt that this scurrilous allegation of damning the first plaintiff as a prostitute was thoroughly false, false to the knowledge of all the defendants It is a matter of regret that the second defendant who is an Advocate has also been a party to this baseless and reckless pleading The oral evidence on the side of the plaintiffs consists of the evidence, about the actual marriage and the evidence of strangers, residents of the village and school teacher to the effect that to their knowledge, the first plaintiff is the legally wedded wife of Arumugham and second plaintiff, their daughter, and that for a considerable time Arumugham, his wife and their daughter lived at Manapparai at the family residential house and that after Arumugham's death, the plaintiffs continued to live with the defendants and that the latter was protecting them putting the second plaintiff into school and looking after her education meeting the expenses thereof The relevant records of the school like application for admission and the record sheet of the second plaintiff have been filed as evidence to show that the second plaintiff was put to school by the defendants and at the time of the admission, she was represented as the daughter of Arumugham The printed voter's list has also been filed to show that the plaintiffs were living in the family residential house at Manapparai The oral and documentary evidence was also relied upon by the plaintiff to show the natural way in which both the plaintiffs were acknowledged and treated just like any other member of the family demonstrating that if the first plaintiff was not the legally wedded wife of Arumugham, the defendants would not have admitted her into the family residential house on equal terms with the other members of the family and the children and that this evidence of the uniform course of conduct of the members of the defendants family would show that the first plaintiff was the legally wedded wife of Arumugham The evidence adduced on the side of the defendant is merely of a negative character The documentary evidence is only about the right of Arumugham to a share in the family properties at the moment of his death Some witnesses have been examined on the side of the defendants to show that there was no marriage between Arumugham and the first plaintiff and the plaintiffs did not live in the family residential house

. . . .

(After discussing the facts their Lordships proceeded to observe :)

Learned Counsel for the appellant took us through the entire oral evidence in an effort to make out that the quality and the quantity of the evidence adduced on the side of the plaintiffs is unsatisfactory and insufficient to warrant a finding that a marriage (legal and factual) had taken place between the first plaintiff and Arumugham The oral evidence of the witnesses examined on the side of the plaintiffs was criticised as being interested, useless and untrustworthy, the substance of the argument being that if such a marriage had actually taken place, far better and more acceptable evidence would be available. We are not inclined to accept these submissions, as they proceed upon a totally wrong perspective of approach. The marriage state being the chief foundation on which the superstructure of society rests, presumption of the marriage arising from cohabitation of spouses is a very strong presumption Where a man and a woman had lived together as man and wife, the law will presume, until the contrary is proved, that they were living together by virtue of a legal marriage and not in concubinage.

The presumption of law is the strongest of legal presumptions and is not lightly to be repelled by a mere balance of probabilities and the evidence repelling that presumption must be strong, distinct and satisfactory Every intendment is made in favour of a marriage *de facto* and the more distant, the date of the marriage; the more readily is the presumption drawn, based upon cohabitation and repute The weight of the presumption gets strengthened when it is proved that the party whose marriage is in question distinctly intended to marry and went through a form of a marriage with that intent and also subsequently lived together as man and wife and were esteemed and reputed as such by those who knew them The presumption still exists, even when there is no positive evidence of any marriage having taken place. Reference may be made to the following statement of law in 19 Halsbury's Laws of England, third edition (Simonds) page 812, paragraphs 1323 and 1324 .

> " *Presumption from cohabitation* —Whether a man and woman have cohabited for such a length of time and in such circumstances as to have acquired the reputation of being man and wife, a lawful marriage between them will generally be presumed, though there may be, no positive evidence of any marriage having taken place, and the presumption can be rebutted only by strong and weighty evidence to the contrary.
>
> *Presumption of validity* —Where there is evidence of a ceremony of marriage having been gone through followed by the cohabitation of the party, everything necessary for the validity of the marriage will be presumed, in the absence of decisive evidence to the contrary, even though it may be necessary to presume the grant of a special licence."

Our attention was drawn to some of the leading decisions in England and India in which strong emphasis was laid on this principle that the evidence to rebut that legal presumption must be very strong, distinct and satisfactory and evidence of cohabitation and repute cannot be lightly repelled by a mere balance of probability or evidence touching the marriage episode as improbable or artificial, or that if the parties had gone through a form of marriage, it would have been in a completely different manner We may refer to the leading decision in *Piers* v. *Piers*[1]. In this decision the House of Lords reversed the view of Lord Chancellor Brady in the Court of Chancery in Ireland Lord Chancellor Brady was not inclined to accept the evidence of marriage on the ground that there was no satisfactory evidence that the Bishop concerned had granted the requisite special licence for the marriage As Lord Chancellor Brady considered the point as a mere question of weight of evidence and the probabilities independent of the legal presumption, Lord Chancellor, the Right Hon'ble Earl of Salisbury (in the House of Lords) even at the threshold stated the law in these terms at page 1129 :

> " Now it does appear to me that the issue so tendered goes very much to explain the ground upon which the Lord Chancellor decided the case, because it shows that according to the view which he took of it, the question in dispute depended upon the greater or less weight of the evidence upon the one side or the other ; otherwise the issue would not reach the question so as to decide upon the validity of the marriage Such an issue would rest upon the balance of evidence as to a particular fact, upon the result of which the validity of the marriage undoubtedly would depend , but that is not the mode in which the law contemplates matters of proof relating to the lawfulness of a marriage It entirely lays aside all the strong legal presumption upon which the law proceeds in the case of marriage, and adjudicates upon the point as upon any other matter of fact, with respect to which there is no presumption one way or the other, but where, upon the result of the investigation as to the existence of the fact, the right of the parties might depend "

In that case it was pointed out that after a distance of time, it might be possible to disprove by some circumstances upon which the factum and validity of the marriage might depend, but that piece of contradiction in the evidence would be wholly

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1. 9 E R 1118

insufficient to satisfy the condition of the positive distinct and satisfactory disproof to repell the presumption

Reference may next be made to the following observations of Lord Champellor at page 1136 where strong legal presumption in favour of the marriage is adverted to

"My Lords, my opinion is, that a presumption of this sort, in favour of a marriage, can only be negatived by disproving every reasonable possibility I do not mean to say that you must shew the impossibility of any supposition which can be suggested to support the validity of the marriage; but you must shew that this is most highly improbable and that it is not reasonably possible Because, otherwise there is a tremendous responsibility cast upon you with regard to the status of the woman and of the children. See the peril which you are encountering; because you may be deciding that a woman is a concubine, and that the children are bastards, upon a mere speculation, when in fact, contrary evidence may afterwards be produced, when it is too late, to shew that there was that in existence which would render the marriage valid, the woman the wife of the person to whom she was married, and the children legitimate My Lords, to avoid such a peril, the law requires that you should negative every reasonable possibility"

It is sufficient to refer to some decisions in which it is held that marriage is established by mere repute on the basis of the legal presumption even though the positive evidence in support of the marriage was not satisfactory In *Collins* v. *Bishop*[1] *A* and *B* cohabited together as man and wife for 30 years and until *B*'s death in 1835 There was no evidence of any marriage having been solemnised, but there was general reputation that they were married and proof of the registry of the baptism of several of their children as of *A* and *B* his wife, and *C*, the brother of *B*, by his will made in 1871, gave a legacy to one of these children, describing her as his niece Malins, Vice-Chancellor, observed as follows at page 33

"I found myself on the broad principle, so essential to the interests of society, that when two persons have lived together for many years as husband and wife, have been universally received as such, and had their children baptized, they should be considered as married people. The decision in *Piers* v *Piers*[2], is in substantial agreement with what I have just stated The Lord Chancellor, in giving judgment, says : The presumution of law (in favour of marriage) must prevail unless it is most satisfactorily repelled by the evidence in the cause appearing conclusive to those who have to decide the question"

We may next refer to the decision in Re *Thompson*, *Langham* v. *Thompson*[3]. In that case a man and woman lived together as husband and wife from 1856 to 1866 and had five children There was evidence that they had been treated as man and wife by friends and neighbours and that their children had been recognised by the head of the father's family. In 1866, the woman left the man, who in 1874, while she was still alive, married another woman When disputes arose in 1904 it was held that the presumption in favour of a marriage having taken-place, had not been repelled by strong, distinct and satisfactory evidence Particular emphasis was laid in that case upon the fact that the head of the family recognised as legitimate children of the man, *i e*, his brother Nathaniel Thompson.

We may next refer to the decision in *Shephard* in re *George* v. *Thyer*[4], as a case of interest and some relevance to the facts of the instant case There too, the principle of the strong presumption arising by long cohabitation and repute pointed out in *Piers* v. *Piers*[2], was applied In that case, an English man and woman travelled to France with the intention of getting married, there purported to go through a form of marriage and since then, lived together in England as man and wife for 30 years and had several children There was some evidence of recognition of the children by the family. Even though it appeared that the marriage, such as the

1. (1878) 48 L J Ch. D 31.
2. 9 E R 1118
3. 91 L T 680
4. (1904) 1 Ch 456

one as was alleged, was impossible, according to French law and the habits of law abiding people in France, it was held that that fact was not sufficient to rebut the presumption in favour of a marriage arising from the long continued cohabitation of parties as man and wife. The main argument against the proof of the marriage was that if the parties had really intended to live as husband and wife, they could have got themselves married by going to the Parish Church in England, instead of a visit to France, that what they did in France was difficult to ascertain in proof and that no marriage can be inferred when such a marriage was impossible according to French law There too the evidence adduced in support of the fact of the marriage was criticised as being insufficient but it was held that all these circumstances were insufficient to out-weigh or repel the presumption arising from the evidence of long cohabitation and repute What happened in that case was stated in these terms at page 461

> " What they did in France is very difficult to ascertain I think I must take it that they went somewhere in accordance with an arrangement made by the intended sister-in-law They went somewhere they purported to go through something like a ceremony of marriage There was a ring put on by the lady herself, some kind of ceremony and something by way of acknowledgment that a marriage had taken place They came home and after a short interval, they lived together as husband and wife There seems to have been some reason for not doing so during the first two or three weeks They have lived together as husband and wife up to the present time, that is, for thirty years, and she has borne several children, and it is their claim which I am considering There is some evidence on the affidavits and some evidence in the witness box today of recognition by the family "

After referring to some of the decisions including *Piers* v *Piers*,[1] the matter was put thus at page 463 .

> " So that I have here a case of the highest authority getting rid of the fact of marriage, and recognition of children . It does not shew that either of these is essential ; but the parties were living together as man and wife for the time mentioned in the report, and it was held that the presumption of marriage must prevail Now here I have the intention to marry . about that there is not a shadow of doubt I have some evidence about which there is a great deal of doubt. There is somewhat romantic story, doubtful in its details, of a marriage *de facto*, of something gone through to perfect the intention of marriage, and I have some evidence or recognition of children Now, after thirty years, the Court has been asked to say that because the marriage has not been proved, and cannot be proved, these children are not to be admitted to share I think I should be going against the authorities if I came to any such conclusion and therefore I must hold that they are entitled to share "

In the instant case too, all that the defendants have attempted to do is merely to create some doubts about the somewhat romantic story of marriage at Mathurai and nothing more It is futile to argue that this is sufficient to repel the presumption.

It is sufficient to wind up the discussion of the legal position on this portion of the case by referring to the observations of Lord Evershed, Master of the Rolls, in the latest decision *In re Taylor* (deceased)[2]. The learned Master of the Rolls has in his judgment extracted the relevant observations in the leading decision *Piers* v. *Piers*[1], and had also made reference with approval to the decision in *Shephard, In re George* v *Thyer*[3], referred to earlier In that case, there was no satisfactory evidence of any marriage ceremony, but there was evidence of cohabitation and repute, that one John Taylor and one Izender had lived together as Mr and Mrs Taylor in a small community during the period 1908 to 1913 till Izender's death and it was held

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1 9 E R 1118
2 (1961) 1 All E R 55
3 L R (1904) 1 Ch D 456

that this evidence of cohabitation and repute was sufficient to raise the strong presumption that they were living together in consequence of a valid marriage and not in state of concubinage After referring to the observations of Lord Cottenham in *Piers* v *Piers*[1], Lord Evershed, Master of the Rolls observed as follows at page 57 :

> In spite, however, of the fact that the language to which I have referred in *Piers* v *Piers*[1], was applied to a case different in an essential respect from the present case, I think that it is none the less true that during the century and more that has followed something like a similar principle seems to have been adopted and treated as applicable in a case where, as here, the question aye or no, were two people married, turns on evidence of cohabitation and reputation in the absence of any evidence of a ceremony I have said that the principle has been applied in some degree, and for the purpose of stating what I now conceive the law to be in a case such as the present I will take a phrase cited by Kekewich, J in *Shephard In re. George* v. *Thyer*[2], a case to which much reference was made in the argument but which in my judgment does not on the facts provide any very safe guidance for the present case In *Shephard, In re George* v *Thyer*[2], Kekewich J, after referring to a Privy Council case, *Sastry Velaider Aroneyaiy* v *Sembucurty Vaigalie*[3], quoted *Stephard's case*[2] the language used in that case by Sir Barnes Peacock
>
> " 'It appears from the authorities which he' (Dr Phillimore) ' cited that, according to Roman-Dutch law there was a presumption in favour of marriage rather than that of concubinage It does not, therefore, appear to their Lordships that the law of Ceylon is different from that which prevails in this country ; namely [and this is the essential sentence] that where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage'."
>
> " I take that passage as a statement of the law which ought to be applied in a case like the present, and I note the adverb "clearly" It is of course, not to be forgotten that in the hundred years that have gone by since *Piers* v *Piers*[1], the law relating to the registration of marriages has been made more strict, communications are easier and the likelihood of people being married and nobody knowing about it and, indeed, not being able to find a record of it is no doubt much decreased "

It is significant to notice that in that case, the evidence of cohabitation and repute was only for a short period of 5 to 6 years Even so, the question was discussed, from this particular perspective, *viz*, whether the evidence adduced on the side of the defendants was cogent, satisfactory and convincing as to repel the presumption. After discussing the evidence and the alleged infirmities on the side of the party seeking to establish the marriage between Taylor and Izender, the Master of the Rolls pointed out that the appellants had not clearly proved that the inference drawn from the evidence of cohabitation and repute was wrong or that the presumption had been rebutted by cogent evidence The particular aspect on which emphasis was laid was that the evidence of cohabitation as man and wife and repute and acceptance of that status by the people of the neighbourhood, obviously threw on the contesting defendants, a very heavy burden and that could be discharged only by most cogent evidence and that the case cannot be decided on a mere question of relative probabilities as in the case of adjudication of other facts which come up for decision before Courts Waiman, L.J, in taking the same view as to the nature of the strong presumption observed that the evidence in rebutting the presumption, must be *firm and clear* and that in a case of that kind it would not be right for the appellate-Court to substitute its own estimate of that evidence, and to hold that the presumption had been rebutted on the basis of the mere credibility of the witnesses.

1 9 E R 1118.
2. L.R (1904) 1 Ch D 456.
3 (1881) 6 App Cases 364

Learned Counsel for the respondent also drew our attention to the decision of the Privy Council in *Mouji Lal* v *Chandrabati Kumari*[1], in which emphasis was laid upon the significance of the evidence of cohabitation and repute that a man and woman lived together as husband and wife and esteemed as such In that case too, the woman had been recognised by all persons concerned in the family as wife their daughters were respectably married, as in the case of legitimate children, and the Privy Council held that the presumption of marriage applied to the forms and ceremonies necessary to constitute a valid marriage. Reference may also be made to the statement of the law in Sarkar's Evidence Act, 11th Edn at page 1015 where the learned author has summed up the case-law (both English and Indian) that the presumption arising from cohabitation and repute can be repelled only by strong and conclusive evidence and the mere fact that direct evidence of marriage which took place many years ago is unsatisfactory would be wholly insufficient to displace the presumption

From the above, it is obvious that the crucial question to be considered is whether the defendants have adduced strong, distinct, satisfactory and cogent evidence to repel the strong presumption arising from long cohabitation and repute As observed earlier, the suggestion that the first plaintiff was living a life of prostitution has to be summarily ruled out as an irresponsible, reckless suggestion without any basis The fact, then remains that from 1943 onwards Arumugham and the first plaintiff were living together cohabiting as husband and wife and they were also acknowledged as such by friends and neighbours and their own relatives The attempt of the defendants is merely to attack and criticise the evidence adduced on the side of the plaintiff as insufficient, unreliable or improbable We are clear in our minds that the evidence adduced on the side of the plaintiffs quite satisfactorily establishes both the distinct limbs, (i) the factum of the marriage and (*ii*) long cohabitation and repute as husband and wife, necessarily giving rise to the strong presumption of a legal marriage The defendants have proved nothing to repel that strong presumption

* * * * * *

(After discussing the facts of the case their Lordships proceeded as follows :)

We are satisfied beyond any doubt whatsoever that the uniform course of conduct on the part of the members of the fifth defendant's family the father and the sons, leads to the irresistible conclusion that they treated the first plaintiff as the legally wedded wife of Arumugham and the second plaintiff as their legitimate daughter. Strangers and neighbours have also dealt with them only on that footing. The evidence indeed is overwhelming in support of this finding We see no substance in the argument that there is no proof that *Homam and Sapathapathi*, the essentials of the marriage have been p oved to have been performed. The presumption is not only with regard to the factum of the marriage, but also with regard to the performance of the requisite ceremonies to constitute a valid marriage It is not as if the first plaintiff has admitted that the necessary ceremonies were not performed and necessary formalities were not observed At page 54, P W 1 has given evidence that *tali* was put on her neck by her husband and she and her husband exchanged garlands in the presence of the idol of Goddess Meenakshiamman Merely because she has not referred to the other ceremonies, it does not mean that those ceremonies were not performed The defendants did not pursue any such line of cross-examination They did not elicit any admission from the plaintiff that the other ceremonies were not performed In fact their cross-examination was for the extreme contention that the whole episode was false and that Arumugham and the first plaintiff never went through any form of a marriage Having taken up such an extreme contention, it does not lie in their mouth to urge that the plaintiff has not proved that the other ceremonies were performed There was no specific pleading or specific issue on that aspect of the matter When once it is proved that the marriage was performed the presumption arises that it is valid in law and that the necessary cere-

1 38 I A 122 21 M L J 933 (1911) I L R 38 Cal. 700 (P.C)

monies had been performed, unless evidence to the contrary is adduced that the necessary ceremonies were not performed We have no hesitation in holding that on this portion of the case, it is a mere case of wicked harassment of the plaintiffs by the defendants who, on account of their influence and wealth are exploiting the helpless situation in which the poor plaintiffs are placed

We shall now take up points 2 and 3 for consideration Arumugham died in 1954, before the Hindu Succession Act of 1956 The first plaintiff would be entitled to 1/6th share in the suit properties under section 3, sub-section (2) of the Hindu Women's Rights to Property Act of 1937 only if she establishes that at the time of his death, Arumugham died leaving an interest in the joint family properties consisting of himself, his father and four brothers and that all the properties involved in the suit are joint family properties The answer to this question turns upon the effect of the release deed, Exhibit B-3, executed by Arumugham in favour of the fifth defendant on 10th November, 1944 and the document executed by the fifth defendant, Exhibit B-1, in favour of the defendants 1 to 4 on 17th November, 1959 That the properties were all the self-acquired properties of the father, fifth defendant, is not in serious controversy and the same has been established beyond any doubt. Exhibit A-10, executed by the father in June, 1943 shows that the father had been dealing with his properties as his self-acquired properties in favour of his four sons and he has even excluded his first son, Rajagopalan in the scheme of distribution on account of some misunderstanding between the fifth defendant and Rajagopalan The next document, Exhibit A-11 of the year 1946 also proceeds on the same footing that the properties are all the self-acquired properties of the fifth defendant, except the change that in the proposed scheme of distribution the father had changed his mind and got reconciled with his eldest son, Rajagopalan. Further the fifth defendant had also executed a deed in favour of his daughters again on the footing that the properties were his self-acquired properties and that was also cancelled by Exhibit A-11. There is no evidence that the family owned any ancestral nucleus, with aid of which, the suit properties were acquired The evidence, oral and documentary shows that all the properties are the self-acquired properties of the fifth defendant

After misunderstandings arose between the plaintiffs and the defendants and immediately after the plaintiffs left the family house of the defendants two registered documents came into existence, one is Exhibit B-1, a registered release deed executed by the fifth defendant, Annavi, in favour of defendants 1 to 4 and another, Exhibit B-2, dated 2nd December, 1959 a registeed partition deed executed between the four brothers, defendants 1 to 4 It is necessary to set out the following relevant portion of Exhibit B-1

> " Deed of Release of right to share executed on 17th November, 1959 by Annavi Pillai, son of Veeramalai Pillai, Hindu, Vellala, Miras, aged about 88 years and residing at Sevalur village cusba, Manaparai, Kulitalai taluk in favour of my sons, (1) Rajagopala Pillai, aged 48 years ; (2) Akilandam Pillai, aged 43 years ; (3) Balasubramania Pillai, aged 35 years ; (4) Somasundram Pillai, aged 32 years, all residng at the aforesaid place is as follows —
>
> Now myself and you four persons have been living as members of undivided family for the past 13 years I have already, of my free will and voluntarily, abandoned and relinquished my rights in respect of my self-acquired properties already acquired by me and all of us have been till today, enjoying these properties as family properties treating those properties as family properties in which all of us have rights Excepting myself and yourselves no one else has any right, share or interest or claim in our family properties "

We are in enjoyment of properties belonging to our family, namely, Indira Talkies, a permanent theatre at Manapparai, Indira Printing Press and Shantha Touring Talkies that functioned at Manapparai and also other properties

Now inasmuch as I have grown old and incapacitated from running the concerns and managing the properties, and also since my wife Santhayi Ammal, died three years ago and as I have desired to take exclusively the family properties described hereunder and you have agreed to the same and as I have myself taken the properties hereunder with absolute rights and as I am enjoying the same from this date onwards, the remaining properties, namely, all the immovable and movable properties, Indira Talkies, Indira Press, Shantha Touring Talkies, Lorry, money-lending transactions and all the other family properties belonging to the family shall belong only to you four persons I shall have no interest, right and future claim whatever To this effect is this deed of release of right to share executed by me with my consent

(*Schedule omitted*)

Witnesses—M S Srinivasan, son of M. N Seshagiri Iyer, 27, Agraharam, Kulitalai M K Venkatarman, Advocate, son of M S Krishnaswamy Iyer, Advocate, 8, Double Mall Street, Tiruchirappalli, V. Krishnamurthy, son of V Venkatesa Iyer, Paylur, Muthrasanallur Post, Tiruchirappalli Taluk Identified by (1) M. K Venkatarama Iyer, son of M S Krishnaswami Iyer, Advocate, (2) V. Krishnamurthi Iyer, son of V Venkatesa Iyer The four brothers thereafter effected a partition of the family properties under a registered deed of partition, Exhibit B-2, dated 2nd December, 1959, there is nothing particular in the terms of the language in this document calling for special mention So far as Exhibit B-1 is concerned, it is very important to notice that it is a document which has been prepared with precision, presumably with the assistance of lawyer or lawyers The second defendant himself is an Advocate and he also should have contributed to the significant recitals in Exhibit B-1 The use of the words in Tamil வாலண்டிரியாக (voluntarily), அபேண்டன் செய்து (having abandoned) and மஜேஇஷ்டப்படி (my own free will) are all terms of significant importance This Exhibit B-1 proceeds on the footing that for the past 13 years (dating back from the date of Exhibit B-1), *i e*, from 1946 onwards, the father and four sons were living as members of joint family and that the father had abandoned or relinquished his rights in the self-acquired properties and they have instead been treated as joint family properties in which all the sons have equal rights In other words, the document proceeds on the footing that the father abandoned his separate rights and there has been a blending of the properties impressing upon them the character of joint family properties and that it is on that basis, the members of the family were enjoying these properties The reference to the position or situation, 13 years back, in the opening portion of the second paragraph is to show that this abandonment by the father and the consequent blending or the change of character of the properties as joint family properties took place in the year 1946 There is no evidence that the specific reference to 13 years, *i e*, dating back to 1946, was due to any mistake or otherwise, and we have to proceed on the footing that that recital is true and correct. It is not the case of any of the parties that there has been any division in status among the members of the family and the reference to 13 years cannot obviously refer to the status of the members of the family as a joint family for a period of 13 years as though, prior thereto, the family was a divided family The reference to 13 years in the context in that clause can mean only the actual abandonment of the separate rights of the father and the consequent blending and impressing upon the properties the character of joint family properties. We are clear in our minds that that clause cannot have any other meaning

At that time Arumugham was undoubtedly alive If there has been a blending by the father of his self-acquisitions, it would only mean that the father has abandoned his separate rights in favour of all the coparceners who constituted a joint family. Hindu law does not permit a blending so as to impress upon the separate properties the character of joint family properties confining that right to some only of the coparceners in the family The doctrine of blending is a peculiar doctrine under Hindu law and blending can be only in favour of the entire body of coparceners. Whether the fifth defendant intended to include Arumugham also as a person

entitled to the benefit of the blending or intended to exclude altogether Arumugham, it is of no consequence The matter does not depend or rest with the intentions of the fifth defendant The legal consequence of blending flows regardless of his intentions In other words, if there has been a blending in 1946, as admitted in Exhibit B-1, the benefit of the blending would enure for all the members of the joint family including Arumugham and the result will be that when all the properties had become joint family properties in which Arumugham also, from the year 1946, had an equal share, it will not be open to the defendants 1 to 5 to enter into any transaction either under Exhibit B-1 or under Exhibit B-2, by which the rights of Arumugham which had devolved upon the first plaintiff under the Hindu Women's Right to Property Act would in any way be affected or prejudiced It would not be open to the father to execute Exhibit B-1 on those terms as to entitle his four sons alone to take the entire properties to the exclusion of the first plaintiff's husband , again it would not be competent to the four brothers to effect a division as they have done under Exhibit B-2 excluding altogether the first plaintiff who is entitled to an equal share in the rights of her husband. To get over this situation, the argument that was advanced on behalf of the defendants is that Arumugham was not a member of the joint family at the time when the blending took place in 1946, as according to the defendants, by reason of the release deed, Exhibit B-3, executed by Arumugham on 10th November, 1944, Arumugham had ceased to be a member of the joint family and that thereafter the joint family consisted only of the father, Annavi and his four sons The argument is that as a result of Exhibit B-3, a division in status must be held to have taken place between Arumugham on the one side and the rest of the members of the family on the other, and that when the blending took place in 1946, the four brothers alone constituted a joint family along with their father Annavi It is not the case of the defendants either in the pleadings or in their evidence or in the arguments, either in the trial Court or before us, that Arumugham effected a formal division in status by making the requisite unilateral declaration as required by Hindu law, at any time before his death This argument advanced is a pure legal one, *i e* , Exhibit B-3, the release deed executed by Arumugham by its own force and without anything more, brought about a division in status between Arumugham and the rest of the members of the joint family A further agrument was advanced that even if Exhibit B-3, did not bring about a division in status, the release deed executed by Arumugham would put an end to all his rights with regard to the suit properties even if the properties became the joint family properties subsequent to the release. It is urged that in Exhibit B-3, Arumugham had not only acknowledged that all the immovable properties, money lending trade, etc , etc , were all the self-acquired properties of the father Annavi, Arumugham had also stated in unambiguous terms that he shall have no legal rights whatsoever in any of those properties and that he had accepted a sum of Rs 500 paid thereunder in full and final settlement of any rights that he could claim in all the properties aforesaid *even after the lifetime of Annavi*. The terms by which Arumugham relinquished and released his rights are too wide, unqualified and unrestricted, that after Exhibit B-3, Argument would not be entitled to put forward any right or claim to the properties either during the life-time of the father or after the latter's death and that in that context it did not matter, whether the properties, right through continued to be self-acquired properties of the father or subsequently became impressed with the character of joint family properties as a result of the alleged blending in 1946 We are not inclined to accept either limbs of this argument It is necessary to set out the terms of Exhibit B-3 which run as follows :

"Deed of release executed on 10th November, 1944, in favour of V. Annavi Pillai, son of Veeramalai Pillai, Vellala Caste, Saivaite, Miras, aged about 75 years and residing at Cusba Manapparai, Kulittalai taluk, Tiruchirapalli district, by Arumugham, third son of the aforesaid person, of the said caste and religion, aged about 26 years and at present residing at Madura is as follows —

" As a result of lack of amity between you and me in the family, I have been residing separately at Madura for the last about one year. All the immovable

and movable properties, money lending transactions, trade and cash that are at present with you, are all your self-acquired properties I have no kind of legal right in them Even so, I have been asking you to give me someting out of them, for my sustenance and you have been refusing to give Ultimately on the recommendation of my mother that I might be given something, and on your acceptance of the same, I have on this date received from you Rs 500 (rupees five hundred) in cash, in the presence of the Sub-Registrar, in full and final settlement of any rights that I may claim in all the properties aforesaid even after your life-time I have, hereby, released all the rights that I may claim over all the aforesaid properties I have no right whatsoever in your immovable properties, cash, money-lending transactions and business dealing "

To this effect have I executed this release with my whole-hearted consent

If the properties were joint family properties in November, 1944 (at the time of Exhibit B-3), Arumugham's rights would be completely extinguished and the release deed executed by him in favour of the father will be regarded as a release deed executed in favour of the entire body of the coparceners In this connection, reference may be made to the recent Full Bench decision of the Andhra Pradesh High Court in *Anjaneyulu* v *Ramayya*[1], in which it was held that the effect of the relinquishment by a coparcener of his share is to separate him from the family while the others continue as members of an undivided family This Full Bench decision applied the principle of the decision of the Supreme Court in *Rukhmabai* v *Laxminarayan*[2], that a member of the joint family need not receive any share in the joint estate, but he may renounce his interest therein and that his renunciation merely extinguishes his interest in the estate, but does not affect those of the remaining members *vis-a-vis* the family properties The release or renunciation, though in form is in favour of one of the members of the joint family and not in favour of the rest of the members of the joint family as a unit, it has been held that in law it should be regarded as a renunciation in favour of the entire body on the reasoning that the legal effect of renunciation is extinction and reduction of the number of members to whom shares would have to be allotted if and when a division takes place—*vide* Mulla's Hindu Law, page 299, section 264, thirteenth edition It is difficult to refer to the Full Bench decision of this Court in *Subbanna* v *Balasubba Reddi*[3], in which it was held that when a coparcener relinquishes his interest in the joint family property, the relinquishment operates for the benefit of all the members even though in form, the deed is executed only in favour of one of them

The renunciation by a coparcener of his interest in the joint family property makes him a divided member from the rest (*vide* Mayne, page 556, paragraph 454, (11th Edn.), and Mulla, thirteenth edition, page 384, section 328, sub-sectin 6). The principle on which such a renunciation is said to have the effect of bringing about a division in status is that when a person is a member of the joint family, he is joint in estate, mess and worship with the rest of the members of the joint family and when he renounces his interest in the joint family properties, there is thereafter no jointness in estate, between himself on the one hand and the other members of the family on the other The essential condition of jointness in estate no longer subsists and necessarily a division in status takes place. When once the community of property between the releaser and the rest of the members of the family stood severed, the legal consequence is that he ceased to be a member of the joint family. From this it will be seen that such a renunciation will have the legal consequence of bringing about a division in status only if there is a renunciation of his interest in the joint family properties In other words, if at the time of the release or renunciation, there are no joint family properties, the release will not have the effect of bringing about a division in status It is unnecessary to refer to the several decisions in which a release was held to have the legal consequences of bringing about a division in

1. (1965) 1 An.W.R. 159 A.I.R. 1965 A.P. 177 (F.B.)
2. (1960) S.C.J. 433 A.I.R. 1960 S.C. 335
3. I.L.R. (1945) Mad. 610: (1945) 1 M.L.J. 140 (F.B.)

status as they are all cases in which the family admittedly owned joint family properties and the release or renunciation was with reference to such properties In the instant case, Exhibit B-3, proceeds on the footing that all the properties of Annavi are his own self-acquired separate properties There is no jointness of estate in that sense or community of properties which became severed as a result of the release, and Arumugham continued to be a member of the joint family even though at that time the family owned no joint family properties From this it follows that when the blending took place in 1946 all the members of the joint family including Arumugham became entitled to rights therein

The question next arises whether Exhibit B-3, would operate as a bar against Arumugham because of the recitals in Exhibit B-3, that Arumugham had released all his rights in the properties including the rights in the properties even after the lifetime of Annavi The question is what is the effect of the relinquishment or release by Arumugham of all rights of every description in the properties in question. It is well settled rule of interpretation of deeds of release that, however, wide and general the covenant of release may be, its operation must be restricted to the rights which are in the contemplation or in controversy between the parties and would not cover or comprehened rights which are never in the minds of the parties at that time It is sufficient to refer to the decision of the Supreme Court *Chinnathayi* v *Kulasekhara*[1]. In that case, the question arose about the scope of a release deed executed by one Sundra Pandiya (under a compromise) by which Sundara Pandiya released and relinquished his rights to succeed to the Zamindari and one Kandasami was acknowledged as the rightful heir The question arose whether this release operated as a bar to the rights of Sundara Pandiya to succeed by survivorship, as and when the succession arose, or whether under the release, Sundara Pandiya merely relinquished his right to succeed to the Zamindari immediately as the seniormost member of the family The Supreme Court held that at the time of the release, the parties were only concerned with the right to succeed to the zamindari as a senior member of the family and that nothing was in the contemplation between the parties as to what should happen in case Kandaswami's line died out Reference may be made to the following observations in paragraph 34, page 37

"The whole emphasis of Mr Raghavan who represented Kulasekhara was on the words of the deed contained in clause 5 set out above Sundara Pandiya by this clause stipulated that he will have no right to the property shown as belonging to the widow Sundara Pandiya was then agreeing that the widow should retain the Zamindari absolutely, his mind being influenced by the will Later on by the compromise made in Kandasami's suit what had been given absolutely to the widow was converted into a life estate with the exception of the pannailands and Kandaswami was acknowledged as the rightful heir The recitals in the release deed, therefore, have to be read in the light of the terms and conditions of the deed of compromise and the proper inference from these is that Sundara Pandiya relinquished his rights to succeed to the Zamindari immediately as the senior most member of the family but that he did not renounce his contingent right of succeeding to it by survivorship if and when the occasion arose It is well settled that general words of a release do not mean release of rights other than those then put up and have to be limited to the circumstances which were in the contemplation of the parties when it was executed (vide *Directors & Co of London and South Western Railway Blackmore*[2] In that case it was said that general words in a release are limited to those things which were specifically in the contemplation of the parties when the release was executed This rule is good law in India as in England The same rule has been stated in *Norton on Deeds at page* 206 (2nd Edn) thus

" The general words of a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given, though they were not mentioned in the recitals "

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1. (1952) S C J 1 : (1952) 1 M L J 292 A I R 1952 S C 29

2 (1870) L R 4 Eng & Ir. App Case 610, 623

In Hailsham's edition of *Halsbury's Laws of England, Volume* 7 at page 251, paragraph 345, the rule has been stated in these terms

> " General words of release will be construed with reference to the surrounding circumstances and as being controlled by recitals and context so as to give effect to the object and purpose of the document A release will not be construed as applying to facts of which the creditor had no knowledge at the time when it was given".

In *Chintamun Singh* v. *Nowlukho Konwari*[1], where the document was drafted in almost the same terms as Exhibit P-17, it was said that though the words of the petition of compromise were capable of being read as if the executants were giving up all rights whatever in the taluk a of Gungore, yet in the opinion of their Lordships the transaction amounted to no more than an agreement to waive the claim to a share in and to the consequent right to a partition of the taluka and there was no intention to change the character of the estate or the mode in which it was to descend The parties in the year 1890 were not thinking of their future rights of survivorship at all What Sundara Pandiya must be taken to have said by this release was " I am giving up my present rights as a senior member in favour of Kandasami whom I recognize as the rightful heir to the zamindari as a member of the joint Hindu family". Kandasami agreed to give him the village of Dombacheri in lieu of recognition of his title by him It was not within the ken of the parties then as to what was to happen to the zamindari in case Kandasami's line died out In view of this clear pronouncement by the Supreme Court, it is unnecessary to burden this judgment by reference to other cases dealing with deeds containing general words of release At the time of Exhibit B-3, none of the parties had any idea of Annavi relinquishing his rights over his self-acquisitions and converting them into joint family properties under the doctrine of blending This peculiar doctrine of blending under the Hindu Law was not present in the mind of Arumugham or in that of Annavi In every portion of the document, Annavi was anxious that Arumugham should acknowledge that the properties were self-acquired properties of Annavi and it would be virtually re-writing this document to import into this deed an intention on the part of Arumugham to relinquish his rights if there should be a blending in future Even assuming that this document be construed as Arumugham releasing his right to a claim on the basis of a blending in future, such a release is void and inoperative as amounting to a release of a mere *spes successionis* or the right to a chance of a legacy, coming within the mischief of section 6, sub-clause (*a*) of the Transfer of Property Act Such a precarious right resting upon the hope of a future blending, depending upon the sweet will and pleasure of Annavi, is nothing more than a *spes successionis*, and the law does not permit a transfer or release of such rights (Vide Mulla's Transfer of Property Act, fifth edition, pages 57 and 61) This principle is well settled and does not require much elaboration, it is sufficient to refer to the Bench decision of this Court in *Abdul Kafoor* v. *Abdul Razack*[2], which contains a discussion of the relevant cases in which either section 6 (*a*) of the Transfer of Property Act or the principle of the same was applied In that case, the question arose whether the release deed executed by a daughter of a Muslim in favour of her daughter relinquishing all her rights of inheritance in the properties of her father on receipt of consideration of Rs 300 would operate as a bar to her rights of inheritance on the death of the father That release deed executed by the daughter was substantially in the same terms as the release deed of Arumugham, Exhibit B-3 in the instant case and the relevant clause is as follows

> "Whereas I have agreed to receive from you a sum of Rs 300 and to execute a release in respect of my rights over the immovable and movable properties belonging to you, the sum received by me in the matter of getting a simple debt bond executed by you is Rs 300 · As this sum of Rs 300 has been received by me in the *aforesaid* manner, I have no right whatever over our immovable and movable properties Hereafter there will be between us friendly relationship only and not

1 (1875) L.R. 2 I A 263 I L R 1 Cal 153 (P.C.).   2 (1958) 2 M L J. 492.

relationship as regards money matters. To the said effect is the deed of release executed by me with consent "

The learned Judge followed and applied the earlier Full Bench decision of this Court in *Asa Beevi* v. *Karuppan Chetty*[1] It was also held that the release cannot be supported on the ground of its being a mere contract not to claim a share when the succession opened and that no distinction can be drawn between a case of actual relinquishment of the chance of inheritance and a contract to relinquish it in future. It was further held that the release could not be upheld as a family arrangement For these reasons, it has to be held :

"(*i*) that the release deed Exhibit B-3 cannot be interpreted as comprehending a mere contingent right depending upon a future blending at the sweet will and pleasure of Annavi , and (*ii*) even if such an effect was intended to be achieved either because of the compelling context or the general words of the document, it would be invalid under section 6 (*a*) of the Transfer of Property Act "

The argument that at that time, the father was greatly displeased with the son and the sole object of getting a release deed was to exclude Arumugham from any rights in the properties whatsoever and that to uphold Arumugham's right on the basis of blending in 1946 would defeat the very purpose of Exhibit B-3 does not appeal to us The answer to this question depends upon the proper interpretation of the terms of the release deed and how far any such contemplated result could be given effect to in the face of the express prohibition in section 6 (*a*) of the Transfer of Property Act.

In the trial Court, the learned Judge had expressed some doubt about the genuineness of this transaction evidenced by the release Exhibit B-3 as the original document of release was not produced The entire reasoning of the learned Subordinate Judge on this portion of the case is wrong Indeed, learned Counsel, for the respondents did not support the view of the trial Court on this aspect of the matter The certified copy of the release deed, Exhibit B-3, has been produced The endorsements show that Arumugham presented the document for registration We see no justification whatsoever for not accepting the evidence of D W 1 He is an absolute stranger to the family and he was in identifying and attesting witness before the Sub-Registrar. He is a representative of a well-established and respectable film company and at the time of the registration of Exhibit B-3, this witness was in Manapparai in connection with the business of this company The document also shows that a sum of Rs 500 was paid to Arumugham at the time of the registration before the Sub-Registrar. In fact, the suggestion in the cross-examination of Annavi, D W 2, is that the release deed was obtained from Arumugham in order to avoid creditors proceeding against the share of Arumugham. The trend of cross-examination accepts that Arumugham had executed the release deed It is unnecessary to labour this point further as Counsel for the respondents accepted the position that Arumugham had executed the release deed, the original of Exhibit B-3

For all these reasons, we confirm the judgment and decree of the trial Court and dismiss the appeal with costs.

S.V.J. *Appeal dismissed.*

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1. (1917) 34 M.L J 460 . I.L.R. 41 Mad. 365 (F B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

A Arpudaswami Chettiar *Petitioner**

v

Deputy Commercial Tax Officer, Nagapattinam .. *Respondent*

Madras General Sales Tax Act (I of 1959), section 16 (1) and Central Sales Tax Act (LXXIV of 1956), section 9 (3)—Central Sales Tax (Madras) Rules—Rule 5 (7)—Power of assessing authority to assess escaped turnover—Escaped turnover—Turnover originally assessed to tax as per Madras Act—If could be re-opened and assessed to tax under the Central Act on the ground that the earlier assessment was not on a proper interpretation of the law.

Rule 5 (7) of the Central Sales Tax (Madras) Rules, which is *in pari materia* with section 16 of the Madras General Sales Tax Act, 1959, is of wide import and the assessing authority under the Sales Tax Act will have jurisdiction to re-assess an earlier assessment on the ground that the earlier assessment did not properly interpret the provisions of the Central Sales Tax Act The use of the word " any reason " shows that the power under the provisions is not limited or circumscribed by conditions similar to those prescribed under the corresponding provision in section 34 of the Income-tax Act Even under section 34 of the Income-tax Act it is now settled law that the word ' information ' would include information as to the true and correct state of the law and relevant judicial decisions

Even if rule 5 (7) of the Central Sales Tax (Madras) Rules is *ultra vires*, the power of reassessment can be exercised under section 9 (3) of the Central Sales Tax Act read with section 16 (1) of the Madras General Sales Tax Act (I of 1959).

State of Madras v. *Louis Drefus & Company, Ltd* (1955) 6 S T C 318, Dist ; *J A Kareem Sait* v. *Deputy Commercial Tax Officer*, (1966) 18 S T C 370, Expl ; *Maharajadhiraj Sir Kameshwar Singh* v. *State of Bihar*, (1959) 37 I T R 388; (1960) M L J. (Cr l) 83 (1960) S C J 145 A I R 1959 S C 1303, Foll *Deputy Commissioner (C T) Coimbatore* v *Srinivasa Iyer*, T C No 85 of 1962 (unreported decision).

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed with W P No 1942 of 1964 on the file of the High Court, the High Court will be pleased to issue a writ of *certiorari* calling for the records in C T Nos 726 of 1959-60, 726 of 1960-61, 726 of 1961-62, 726 of 1962-63 (in W P Nos 1942 to 1945 of 1964) respectively and quash the orders, dated 23rd November, 1964, and made therein.

K. Parasaran, for Petitioner

N. Thiagarajan, for the Special Government Pleader, for Respondent.

The Court made the following

ORDER —These Writ Petitions involve a common question for consideration and therefore they are heard together They relate to assessments made on the Petitioner under the Central Sales Tax Act respectively for 1959-60, 1960-61, 1961-62 and 1962-63 It is not necessary to mention the figures of turnover for the purpose of these writ petitions What is important to be noticed is that for the several years mentioned above and in respect of the items of turnover now in dispute, the assessing authority made assessments on the footing that they were local sales assessable under the Madras General Sales Tax Act The relevant assessment orders for four years mentioned under the Madras Sales Tax Act were passed on 15th January, 1961, 15th July, 1961, 19th December, 1962 and 3rd December, 1963. The assessee is a candle merchant and he supplies candles to churches and other institutions both in Madras State and outside Regarding the turnovers in dispute

* W P. Nos 1942 to 1945 of 1964. 27th July, 1967.

the factual position was that they represented sales of candles to purchasers outside the Madras State and despatched by the petitioner himself through lorries and trains In the railway receipt or the lorry receipt the assessee noted his name as the consignor and the buyer's name as consignee The Sales Tax Department in the orders mentioned above concluded that the transactions were sales completed in Madras State and assessed them under the Madras General Sales Tax Act of 1959 The officer who made these assessments was the Deputy Commercial Tax Officer at Nagapattinam But when it came to the corresponding turnover in 1963-64, the Deputy Commercial Tax Officer was of the opinion that sales of the same description should have been really assessed under the Central Sales Tax Act because the transactions occasioned the movement of the goods from one State to another thereby attracting the definition of sales in the course of inter-State trade or commerce given in section 3 of the Central Sales Tax Act, 1956 Not merely did he make the assessment thus under the Central Sales Tax Act on the corresponding turnover for 1963-64 but he also felt called upon to re-assess the corresponding turnovers already assessed as stated above under the Madras General Sales Tax Act for the four years abovementioned and issued on 9th June, 1964, a notice to the assessee relying upon rule 5 (7) of the Central Sales Tax (Madras) Rules, which is in the following terms .

"If for any reason, the whole or any part of the turnover of business of a dealer has escaped assessment to tax in any year, the assessing authority may, at any time within five years next succeeding that to which the tax relates, determine to the best of his judgment the turnover which has escaped assessment and assess the tax payable on such turnover after issuing a notice to the dealer and after making such enquiries as he considers necessary"

After hearing the representations of the assessee, he decided that in so far as the turnovers above mentioned were not assessed to Central Sales Tax, but only to the local sales tax of the Madras State, there was an escape of assessment within the meaning of the above rule and therefore he re-assessed them to Central Sales Tax by assessment made on 23rd November, 1964 The petitioner has filed these Writ Petitions challenging the above mentioned re-assessments

The argument initially urged by Sri Parasaran, who appears for the petitioner, is that the Deputy Commercial Tax Officer in making the re-assessments was really sitting in appeal over the assessments made earlier by the then Deputy Commercial Tax Officer. The Deputy Commercial Tax Officer who made the assessment on the earlier occasion under the Madras General Sales Tax Act must be presumed to have been fully aware of the relevant provisions of the Central Sales Tax Act which were in force at the time also In fact it is urged that in the year that preceded the present set of four years, *viz*, 1958-59, with regard to the return of the corresponding turnover representing sales outside the Madras State, the assessment officer held that they were local sales and completed the assessment accordingly and that assessment became final It is urged by the learned Counsel, that the jurisdiction under rule 5 (7) to make an assessment of escaped turnover does not involve the exercise of what is plainly an appellate jurisdiction, involving the correction of erroneous decisions by assessing authorities on prior occasions, which should be properly the function of the higher appellate authorities who have been provided by the Act itself for that purpose He referred in this connection to decisions under the provision of section 34 of the Indian Income-tax Act of 1922 Section 34 (1) is in the following terms :

Section 34 (1) :

"If—

(*a*) the Income-tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income under section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income-tax have escaped assessment for that year, or have been under-assessed or assessed at too low a rate, or have been made the subject of excessive relief under the Act, or excessive loss or depreciation allowance has been computed, or

(*b*) notwithstanding that there has been no omission or failure as mentioned in clause (*a*) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income, profits or gains chargeable to income-tax have escaped assessment for any year, or have been under-assessed, or assessed at too low a rate, or have been made the subject of excessive relief under this Act, or that excessive loss or depreciation allowance has been computed, he may in cases falling under clause (*a*) at any time and in cases falling under clause (*b*) any any time within four years of the end of that year, serve on the assessee, or if the assessee is a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22 and may proceed to assess or re-assess such income, profits or gains or recompute the loss or depreciation allowance; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section "

But one crucial point of distinction between section 34 (1) of the Indian Income-tax Act and rule 5 (7) of the Central Sales Tax Rules extracted above may be straight-away mentioned at this stage Section 34 (1) refers to definite information which has come into possession of the Income-tax Officer leading to a discovery of escape of assessment, but rule 5 (7) is wider in scope and uses the words " if for any reason ". A provision similar to that found in rule 5 (7) was also found in rule 17 of the Rules framed under the Madras General Sales Tax Act, 1939, and this rule was later on incorporated in the body of the Act itself as section 16 when the Madras General Sales Tax Act was amended in 1959 Therefore it is clear that the Sales Tax Act deals with a situation where the authority empowered to assess escaped turnover can exercise that power " for any reason " which leads him to the conclusion of turnover having escaped assessment, whereas section 34 (1) narrows down the situation to the extent that it refers to information reaching possession of the Income-tax Officer after the earlier assessment and leading to the discovery of escaped assessment I will briefly refer to the decisions cited in this connection at the Bar

The decision of a Full Bench of this Court in *State of Madras* v *Louis Dreyfus & Company Limited*[1] held the field for a long time That decision was given in connection with rule 17 of the Madras General Sales Tax Rules, 1939, and it defined " escape " for the purpose of this rule, in the following terms ·

" The ' escape ' that serves as the foundation of the jurisdiction to re-open an assessment is that of ' turnover ' and not be it noted, an assessment ' Turnover ' escapes when it is not noticed by the officer either because it is not before him by reason of an inadvertence, omission or deliberate concealment on the part of the assessee, or because of want of care on the part of the officer, the turnover though in the books has not been taken notice of This would be the natural and normal meaning of the expression ' turnover ' 'which has escaped ' in rule 17 (1)

There is no real analogy between rule 17 (1) of the Madras General Sales Tax Rules, 1939, and the provisions of section 34 of the Indian Income-tax Act, 1922 "

Relying upon these observations learned Counsel contended that the turnover now assessed was before the assessing officer on the earlier occasion, that he took it into account, but decided according to the best of his reasoning, that it should be assessed only under the Madras Act, but what we have here is an alteration of opinion by a subsequent Deputy Commercial Tax Officer leading to a re-assessment and not any of the situations mentioned in the Full Bench decision, such as failure to notice the turn over in question by reason of inadvertence, deliberate concealment, or want of care, etc

In *N Naganatha Iyer* v *Commissioner of Income tax*[2], a Bench of this Court dealing with assessment to income-tax under section 34 observed that when a return had

1 (1955) 6 S.T C 318 60 I.T R 647.
2. (1965) 2 I T J 326, (1965) 2 M L J 242,

been filed but no assessment had been made, it could not be said that income escaped assessment so as to justify action under section 34

In *Sankaralinga Nadar* v *Commissioner of Income-tax*[1], again a case which arose under section 34 of the Indian Income-tax Act, a Bench of this Court held that an action under section 34 of the Act cannot be justified on the ground of a mere change of opinion regarding the chargeability of income on the part of the reassessing officer different from his own previous opinion or from that of his predecessor-in office But the Court qualified the remark by saying that income which escapes assessment as a result of the lack of vigilance of the Income-tax Officer or due to inadvertence or negligence or to the perfunctory performance of his duties without due care and caution can well be within the ambit of section 34 (1) (*b*) provided the requirements of that section are satisfied.

The decision in *Maharaj Kumar Kamal Singh* v *Commissioner of Income tax*[2] is an important land-mark in the case law under section 34, wherein the Judges of the Supreme Court laid down certain important principles for applying section 34. They held :

" (*i*) that the word ' information ' in section 34 (1) (*b*) included information as to the true and correct state of the law, and so would cover information as to the relevant judicial decisions,

(*ii*) that ' escape ' in section 34 (1) (*b*) was not confined to cases where no return had been submitted by the assessee or where income had not been assessed owing to inadvertence or oversight or other lacuna attributable to the assessing authorities, even in a case where a return had been submitted, if the Income-tax Officer had erroneously failed to tax a part of the assessable income, it was a case where that part of the income had escaped assessment,

(*iii*) that, therefore, the decision of the Privy Council was ' information ' within the meaning of section 34 (1) (*b*) and that the decision justified the belief of the Income-tax Officer that part of the appellant's income had escaped assessment for the relevant year."

In that case at the time of the original assessment an item of income was excluded from the scope of income-tax assessment because the law laid down by the Patna High Court treated such income as agricultural income, but subsequently the Privy Council reversed that decision holding that such an income was not agricultural income Thereupon the Income-tax Officer initiated re-assessment proceedings and the Supreme Court held that the correct view of the law as laid down subsequently by the Privy Council should be treated as ' information ' giving jurisdiction to re-assess under section 34 (1) (*b*) It was urged by the learned Counsel Sri Parasaran that the present is not a case where the law had altered, and one earlier authoritative view of the law had been replaced by another view What has happened is that the subsequent assessment officer considered that the view taken by his predecessors-in-office was wrong without any fresh information or without any fresh authoritative decision of a Court of law about the correct position of the law He contended that this point was left open by the Supreme Court in the concluding portion of their judgment in the report above mentioned He therefore urged that, in this state of the law, it cannot be held that the assessing officer in the present case acted properly within the jurisdiction conferred under rule 5 (7) to assess the escaped turnover

But the learned Counsel appearing for the respondent-assessing authority urges that whatever may be the view in regard to section 34 (1) of the Income-tax Act, there cannot be any more doubt at the present moment, in regard to the interpretation of a provision like the one found in rule 5 (7), in view of a subsequent decision of the Supreme Court as well as a decision of this Court In *Maharajadhiraj Sir*

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1 I L R (1963) Mad 214 48 I T R 314 C) 92 (1959) 1 M L J (S C) 92 (1959) S.C.
2 (1959) 35 I T.R 1, (1959) 1 An W R. (S J 230, A I.R 1959 S C 257.

Kameshwar Singh v *State of Bihar*[1] the Supreme Court had to consider section 26 of the Bihar Agricultural Income-tax Act which contains a clause " if for any reason any agricultural income has escaped assessment for any financial year or " etc , etc , and therefore *in pari materia* with the clause in rule 5 (7) In that case an earlier assessment under the Agricultural Income-tax Act had been made and confirmed Later on the same Agricultural Income-tax Officer re-interpreted the terms of a lease deed relied upon on the earlier occasion and came to the conclusion that the rent under that lease deed ought to have been assessed as income of the assessee and to that extent it had escaped assessment on the earlier occasion and reassessed it under section 26 When the attention of Hidayatullah, J , who delivered the judgment of the Supreme Court, was drawn to the issue which was left open in the earlier Supreme Court decision cited above, he observed at page 394

> " The use of the words ' any reason ' which are of wide import dispenses with those conditions by which section 34 of the Indian Income-tax Act is circumscribed The point which was thus left over by Gajendragadkar, J , cannot arise in the context of the Act we are dealing with "

The Supreme Court concluded that " the Agricultural Income-tax Officer was competent under section 25 of the Act to assess as item of income which he had omitted to tax earlier, even though in the return that income was included and the Agricultural Income-tax Officer then thought that it was exempt."

In an unreported decision of a Bench of this Court in *The Deputy Commissioner (C T), Coimbatore* v *D Srinivasa Iyer*[2], Venkatadri, J , who delivered the judgment of the Bench relied upon *Maharajadhiraj Sir Kameshwar Singh* v *State of Bihar*[1] and held that Joint Commercial Tax Officer had jurisdiction under the Madras General Sales Tax Act to revise his own original order and by a subsequent order refix the turnover at an enhanced amount and assess the tax on the revised turnover, relying for that purpose on section 16 (1) of the Madras General Sales Tax Act, 1959, which, as observed earlier, is *in pari materia*, with rule 5 (7) of the Central Sales Tax Rules In view of these authoritative statements on the interpretation to be given to the terms of rule 5 (7) of the Central Sales Tax Rules as well as section 16 (1) of the Madras General Sales Tax Act, 1959, it will not be proper to hold that the Deputy Commercial Tax Officer in this case had no jurisdiction to re-assess the earlier assessment which had been made under the Madras General Sales Tax Act, on the ground that the earlier assessment did not properly interpret the provisions of the General Sales Tax Act the inter-State sales, and that on the correct view of the relevant provisions, the turnover should have been assessed only under the Central Sales Tax Act and not under the Madras General Sales Tax Act I may incidentally observe that there was no attack at the time of the hearing about the correctness of the legal position about the assessability of the turnover in question under the Central Sales Tax Act.

The next argument that was urged by Sri Parasaran was that Veeraswami, J., delivering the judgment of a Bench of this Court in *Haji J A Kareem Sait* v *Deputy Commercial Tax Officer*[3] struck down rule 5 (7) of the Central Sales Tax (Madras) Rules as being *ultra vires* the rule making authority and that will be a ground for quashing the assessment in the present case also But it has to be borne in mind that in *Haji J A Kareem Sait* v *Deputy Commercial Tax Officer*[3] what was attacked was the validity of the assessment under rule 5 (7) made by the assessing authority, just as the petitioner had done in the present case, by means of a writ petition However, the Bench held that even though the re-assessment could not be sustained under rule 5 (7) as that rule was *ultra vires*, the Revenue could maintain and support the re-assessment on the ground that section 9 (3) of the Central Sales Tax Act would confer on the assessing authority power to assess turnovers under the Central Sales Tax Act and for that purpose he could exercise all the powers under the Madras General Sales Tax Act Such powers would include the power under section 16 (1)

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1 (1959) 37 I T R 388 (1960) M L J (Crl) 83 (1960) S C J 145 A I R 1959 S C 1303
2 T C N 35 of 1962
3 (1966) 18 S T C 370.

to re-assess escaped turnovers Therefore the Bench held that even after rule 5 (7) is struck down as *ultra vires*, there will be no room to quash the re-assessment, because in any event section 9 (3) of the Central Sales Tax Act, read with section 16 (1) of the Madras General Sales Tax Act would confer jurisdiction to re-assess, the turnover which had escaped

There was an argument by the learned Counsel for the respondent State that the petitioner ought not to have approached this Court for remedy by way of writ proceedings when he had before him, the remedy by way of appeal to the hierarchy of Tribunals under the General Sale Tax Act As against this, the petitioner's Counsel urged that he had an argument to put forward regarding the jurisdiction of the authority to assess the turnovers as escaped turnovers, that in any event he had an argument to put forward about the vires of rule 5 (7), that these contentions he could not urge before the Tribunals constituted under the Act itself, and that this circumstance would give him a right to invoke the powers of this Court under Article 226 of the Constitution I am inclined to accept this argument and hold that, on the pleas put forward, the petitioner was entitled to approach this Court, for remedy under Article 226 of the Constitution But, in view of the considerations set out earlier, no relief can be afforded in these writ petitions because the decisions above cited clearly give jurisdiction to the assessing authority for re-assessing the escaped turnovers in this case.

The petitions are dismissed.

Before parting with the cases, I will refer to a representation made by the learned Counsel for the petitioner with, in my opinion, a great deal of justification, that this is an unfortunate case where the assessee who had been made to pay assessment on the concerned turnover under the Madras General Sales Tax Act at a lower rate, is being re-assessed on the same turnover under the Central Sales Tax Act at a higher rate, but without any assurance being given to him of the necessary refund where there had been excess realisations, or adjustment as the case may be In counter affidavit of the Department in these writ petitions, there is an averment for the purpose of meeting this complaint, that the assessment under the Madras General Sales Tax Act in respect of the turnover involved in these years will be " revised " by the appropriate authority suitably after the present assessment proceedings are finalised. It is not clear to me what is meant by the statement about ' suitable revision ' It is a vague statement, and the petitioner feels apprehension about his relief It will be much better for the assessing authorities to give credit to the amounts collected from the assessee under the assessment made under the Madras General Sales Tax Act when making a demand for the assessment at the higher rate levied under the Central Sales Tax Act so that the assessee is not compelled to pay over any part of the sum twice But if he had already paid any amount twice over the simplest way is to give credit to what has already been paid twice over and collect only the balance and make the necessary adjustment between the amounts due to be collected under the Central Sales Tax Act and the Madras General Sales Tax Act under the appropriate heads of account

No order as to costs

R M *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. S. KAILASAM.

M. Jayaram .. *Petitioner**

v.

Sri Rama Vilas Service Ltd., Kumbakonam, and another .. *Respondents.*

Madras Motor Vehicles Rules, rule 208 (c)—Application for extension of route filed in Form PVA—Application however described as one for variation—Maintainability.

Constitution of India (1950), Article 226—Point raised for first time involving decision on disputed facts—Not allowed to be urged in writ petition.

Where the petitioner applied before the Regional Transport Authority for variation of one of the conditions of his permit by extension of the route and the application was filed in Form PVA as required by rule 208 (*c*) of the Madras Motor Vehicles Rules, but by mistake the petitioner described his application as one for variation, on the question whether the application was maintainable.

Held, the word "variation" in rule 208 (*c*) included both variation as well as an extension, both being variations of conditions of a permit, and when the nature of the variation desired was clearly given in column (13) of Form PVA, it could not be said that the requirements of rule 208 (*c*) had not been complied with.

Even otherwise, *i.e.*, even if it should be held that the petitioner was in error in making an application for variation, if the Regional Transport Authority had the power to grant what was in fact prayed for, it could grant it in spite of the fact that the name given was erroneous. In such a case dismissing the application as not maintainable would be wholly technical and unsupportable in law.

A question which is raised for the first time and which would involve a decision on disputed questions of facts should not be allowed to be urged in a writ petition under Article 226 of the Constitution.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records connected with the order of the second respondent herein in Appeal No. 433 of 1967, dated 4th August, 1967 and quash the same.

M. N. Rangachari, for Petitioner.

K. K. Venugopal, for Respondent 1.

T. Selvaraj, Government Pleader, for Second Respondent.

The Court made the following

ORDER.—This petition has been filed for the issue of a writ of *certiorari* calling for the records of the State Transport Appellate Tribunal, Madras in Appeal No. 433 of 1967, dated 4th August, 1967, and to quash the order. The petitioner is a bus operator in South Arcot region. His bus MDF 1866 is plying on the route Cuddalore to Sirkali *viz*, Portonovo, Bhuvanagiri, Chidambaram and Coleroon. In April, 1966 he applied to the Regional Transport Authority, South Arcot, the primary authority for varying the condition of the permit. He sought to extend the route from Cuddalore to Sirkali as Cuddalore to Vaitheeswarankoil. The Regional Transport Authority, South Arcot considered the petitioner's application and felt that the extension was in the interest of the public. The Regional Transport Authority, Tanjore did not give his concurrence for the extension of the route. The Regional Transport Authority, South Arcot then moved the Transport Commissioner for settlement of the dispute under section 44 (3) (*c*) of the Motor Vehicles Act. The Transport Commis-

* W.P. No. 2400 of 1967. 24th November, 1967.

sioner found that the extension of the route was desirable in the public interest The Regional Transport Authority, South Arcot, thereafter considered the matter and granted the variation of the condition of the permit applied for to enable the petitioner to run his bus from Cuddalore to Vaitheeswarankoil The first respondent objected to the extension of the route and preferred an appeal against the order of the Regional Transport Authority, South Arcot to the State Transport Appellate Tribunal, Madras.

The State Transport Appellate Tribunal, Madras raised four points for determination, namely

(1) Whether the application by the respondent for variation of his route as Cuddalore to Vaitheeswarankoil is not maintainable ,

(2) Whether the variation or extension could be granted only by the Regional Transport Authority, Thanjavur.

(3) Whether the order of the lower authority is vitiated on the ground that it had not applied its mind , and

(4) Whether the order of the lower authority is not proper.

The State Transport Appellate Tribunal held that the variation or extension as prayed for could be granted by the Regional Transport Authority, South Arcot It also found that the order of the Regional Transport Authority, South Arcot was not vitiated on the ground that it did not apply its mind. On he fourth point it held that the grant of the extension, if the application is treated as one for extension, was fully justified. The State Transport Appellate Authority allowed the appeal of the first respondent on the ground that the application was one for variation and not for extension, and as such the application was not maintainable The petitioner submitted before the State Transport Appellate Tribunal that he was bound to send in the application in the prescribed form, and as the form relates to the variation, it cannot be said that the petitioner was in error in filling up the various columns in the form as he was required to do But this contention was rejected by the State Transport Appellate Tribunal on the ground that the application was made subsequent to the amendment introduced by Act III of 1964 to section 48 (3) of the Motor Vehicles Act. The attempt of the petitioner to rely on section 134 (2) of the Motor Vehicles Act was also rejected by the State Transport Appellate Tribunal on the ground that it related to an order of the Transport Authority, and not to an application which was made for variation.

Section 48 (3) (*xxi*) as amended by Madras Act III of 1964 provides that the Regional Transport Authority may vary, extend, or curtail the route or routes or the area specified in the permit , provided that in the case of variation, the termini shall be altered, and the distance covered by the variation shall not exceed twenty-four kilometres and in the case of extension, the distance covered by the extension shall not exceed twenty-four kilometres from the termini. This amended sub-clause enables the authorities to grant a variation or extension provided the distance does not exceed 24 kilometres But, so far as the variation is concerned, it is also provided that the termini shall not be altered In this case, the original route was between Cuddalore and Sirkali and the route was sought to be extended as between Cuddalore and Vaitheeswarankoil, which is four or five miles beyond Chidambaram The word ' variation ' is used to denote any alteration in the route where both the termini are kept in tact. In this case, as the route is extended from one termini, it will not be variation, but only an extension. Therefore, the application for variation was not right. It was submitted that Rule 208 of the Madras Motor Vehicles Rules prescribed the procedure for variation of the permit and it was followed. Rule 208 (*c*) of the sai . rules required that an application for variation of conditions of permit under sub-section (8) of section 57 of the Act in respect of a Transport Vehicle shall be in form PVA. It is admitted that the word ' variation ' in Rule 208 (*c*) of the Rules includes variation as well as an extension, as both will be a variation of conditions of permit. The applicant is required to fill up form PVA. Column (13) of

form PVA requires that the nature of variations desired and the manner in which public interest will be served thereby should be given The word 'variation' under this column would include both variation and extension When the nature of the variation is given, it cannot be said that the requirements of the rule have not been complied with According to the terminology used in section 48 (3) (*xxi*) of the Act, it is clear that what was asked for was an extension, though the word 'variation' is used. It is also not disputed that the extension asked for does not exceed 24 kilometres from the termini and as such the Regional Transport Authority has ample jurisdiction to grant the extension as prayed for Even if it is taken that the petitioner was in error in making an application for variation, if the Regional Transport Authority had the power to grant what was in fact prayed for, it could grant it in spite of the fact that the name given is erroneous. The view taken by the State Transport Appellate Tribunal is wholly technical and unsupportable in law. In fact, Mr K. K Venugopal, learned Counsel appearing for the respondent did not support the order of the State Transport Appellate Tribunal on this ground

He submitted that the order of the State Transport Appellate Tribunal can be supported on the ground that the proceedings of the Regional Transport Authority was not in accordance with the law. He contended that on the application made by the petitioner, the Regional Transport Authority, South Arcot granted the extension of the route subject to the concurrence of the Regional Transport Authority, Tanjore. The Regional Transport Authority, Tanjore, refused concurrence by an order, dated 27th June, 1966 Subsequently, the Regional Transport Authority, South Arcot, made a reference to the Transport Commissioner under section 44 (3) (*c*) of the Act for settling the dispute. The Transport Commissioner decided the question in favour of the Regional Transport Authority, South Arcot holding that it is in the public interest to grant the extension prayed for. Again, the matter was taken up by the Regional Transport Authority, South Arcot who after hearing the parties, held on 14th February, 1967, that the variation prayed for should be granted and granted the extension It was submitted by Mr K K. Venugopal, that the proceeding of the Regional Transport Authority, South Arcot for determining the question whether the variation was called for or not was judicial in nature, and when the Regional Transport Authority, South Arcot granted an extension subject to the concurrence by the Regional Transport Authority, Tanjore and when the concurrence was declined by the Regional Transport Authority, Tanjore, the proceedings came to an end, and the subsequent reference by the Regional Transport Authority, South Arcot to the Transport Commissioner and his further proceedings after the reference was submitted to be illegal and beyond jurisdiction. This point is taken for the first time before this Court Before the State Transport Appellate Tribunal, it was submitted that when the Transport Commissioner took the view that the variation was for public interest, the Regional Transport Authority, South Arcot, did not apply his mind over the question and therefore the order of the lower authority was vitiated on the ground that it was guided by the direction given by the Transport Commissioner This point as already stated was found against by the State Transport Appellate Tribunal which found that the Regional Transport Authority, South Arcot had applied his mind For the first time in the counter affidavit filed in this writ petition, the 1st respondent submitted that the reference by the Regional Transport Authority, South Arcot to the Transport Commissioner was not only misconceived but the direction given by the Transport Commissioner was without jurisdiction and the order of the Regional Transport Authority, South Arcot after the receipt of the order of the Transport Commissioner was illegal. The objection now taken, namely, that the proceeding of the Regional Transport Authority, South Arcot, before reference to the Transport Commissioner was judicial in nature that the petition was finally disposed of when the Regional Transport Authority, Tanjore, passed his order and that the Regional Transport Authority, South Arcot cannot again take up the matter for disposal, has not been raised even in the memo of grounds Mr M N Rangachary, learned Counsel for the petitioner submitted that the respondent should not be allowed to urge this point, as not only

it is raised for the first time in this Court, but that a decision on the question would involve a decision on disputed facts According to Mr. Rangachary, the proceeding at the first instance when the Regional Transport Authority, South Arcot expressed himself in favour of the variation subject to the concurrence by the Regional Transport Authority, Tanjore was purely administrative in nature and when there was a difference of opinion between the two Regional Transport Authorities, the reference to the Transport Commissioner was also administrative in nature According to the learned Counsel for the petitioner, only the proceeding after the receipt of the opinion by the Transport Commissioner when notice was issued to the parties was judicial in nature. The question raised by Mr K K Venugopal cannot be decided without giving a decision on the disputed facts As this cannot be done at this stage, and as this question is raised for the first time in this writ petition, I decline permission to the learned Counsel for the respondent to impeach the order of the Regional Transport Authority, South Arcot on this ground

In the result, the Writ Petition is allowed and the order of the State Transport Appellate Tribunal is quashed There will be no order as to costs

V.K. ——— *Petition allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN

Kandaswami Weaving Factory & Co , a registered Partnership firm by managing partner J. K. K Sundararajan, Salem . *Petitioner**

v

Regional Director, Employees' State Insurance Corporation, Madras-14 and another .. *Respondents.*

Employees' State Insurance Act (XXXIV of 1948), section 2 (9)—Handloom and powerloom factory—Workmen employed on piece rate basis—If " employees " as to attract provisions of the Act—Test to determine

The principal requirement of a contract of service is the right of the master in some reasonable sense to control the method of doing the work; the nature or the extent of the control must necessarily vary from business to business and is by its very nature incapable of precise definition

In the present case it is clearly established that the master, running a powerloom as well as handloom factory, had a voice in the selection of the goods to be manufactured and also in the quality of the goods He had also provided that the work should be done in *his own premises* by the workers, even though no fixed hours were fixed and they were paid on piece rate basis In the above circumstances it will be a necessary concomitant of the agreement between them, that the management will have constant supervision over the work of the labourer, to ensure that the labourer does not waste the warp that the management had supplied to him, and that the net product that emerges from the loom, conforms to the specified requirements of the employer One can visualise the management insisting that the weaving of threads should be sufficiently close, that the threads used from time to time are not broken too frequently, leading to too many knots in the woven fabric All these are incidental details of supervision in a situation like the present, when a master weaver engages a number of workers to work at looms in his own factory for producing articles according to his stipulation and of the desired quality and desired variety The Tribunal below was therefore right in holding this to be a contract of service and not a contract for service and that the provisions of the Employees' State Insurance Act are attracted.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will

* W.P. No 1061 of 1965. 6th December, 1967.

be pleased to issue a writ of *certiorari* calling for the records in E S.I. Case No 1 of 1959 on the file of the Additional Commissioner for Workmen's Compensation, Madras and quashing his Order, dated 1st September, 1961.

N R Raghavachari, for Petitioner.

R Krishnamurthi, for Respondents

The Court made the following

ORDER —The short question which arises for consideration in this writ petition is whether the petitioner who runs a handloom as well as power-loom factory is a person who is bound to make a contribution under the Employees' State Insurance Act for the employees in his establishment The petitioner took up the stand that in his establishment there were no employees as defined in section 2 (9) of the Act XXXIV of 1948, the Employees' State Insurance Act, 1948, that what obtained between himself and the workers in his factory was only a contract for service and not a contract of service and therefore he was not bound to pay contribution in respect of the workers under the aforesaid Act But the Employees' State Insurance authorities rejected his contention and held that he was liable to pay the contribution under the Act Against the order of the Regional Director of the Insurance Corporation demanding payment of contribution the petitioner filed an appeal under section 75 of the Act in the Court of the Additional Commissioner for Workmen's Compensation, Madras, who confirmed the order of the Director Aggrieved against that order the petitioner has come to this Court for relief under Article 226 of the Constitution by way of a writ of *certiorari*.

I may mention at this stage that earlier the matter was brought before this Court as an appeal in C M A No 84 of 1962 against the order of the Additional Commissioner But Veeraswami, J , held that an appeal was not competent and rejected the appeal This writ petition is filed as a consequence of the dismissal of the appeal

It is contended by the learned Counsel appearing for the petitioner, Sri N R. Raghavachariar, that the findings of the Tribunals below about the nature of the employment would attract the principles laid down by this Court in *Palaniappa Mudaliar* v *Additional First Class Magistrate, Kulitalai*[1], a judgment of Balakrishna Ayyar, J , as well as the decision of the Supreme Court in *Shankar Balaji* v *State of Maharashtra*[2] Before examining the applicability of these decisions to the present case I will set down briefly what are the findings of fact arrived at by the tribunals below regarding the nature of the work done in the petitioner's factory.

The petitioner's contention was that in his factory the business done is weaving of bed sheets, ribbons and dhothies and that he has maintained both power-looms as well as handlooms for the purpose At a time about 70 persons work at the power-looms and about 120 persons work at the handlooms The petitioner contended that weavers in the neighbourhood go over to his factory, undertake weaving of bed-sheets, dhothies and ribbons out of the yarn supplied by the petitioner, that the weaving is done in the premises itself, that payment is not made as wages for work done at any particular time but is made according to the rates stipulated for a particular fabric woven and turned out by each individual weaver The weavers had no fixed hours of work They can work in the premises at any time convenient to them The workers can go as they like and come as they like and work on such days as are convenient to them In such circumstances, the petitioner contended that there was no relationship of master and servant and there is only a contract for service instead of a contract of service But the finding of the Additional Commissioner for Workmen's Compensation who inspected the factory on 20th June, 1961, gives a substantially different picture of the nature of the employment He found that there were two sections of machines in the business, one for power-looms for manufacturing cloth and ribbon and the other for handlooms for manufacturing dhothies Handloom weavers are paid on the basis of yards of ribbon manufactured

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1 I L R (1958) Mad 999 (1958) M L J (Crl) 699. (1958) 2 M L J 346 (1958) 2 L L J 744.

2 (1962) 2 S C J 426 (1962) M L J. (Crl.) 577 . A.I R 1962 S.C 517.

by them once a week Powerloom weavers are paid on the basis of quantity of cloth produced by them once a week One significant point was that the workmen are required to make dhothies, etc, out of the yarn supplied by the applicant *only as specified by the applicant* The applicant controls the type of cloth to be made and the quality also The Additional Commissioner found that it was evident that the applicant had full control over the workmen when they were employed inside the establishment, though they were paid only at piece rate basis.

In the judgment of Balakrishna Ayyar, J., in *Palaniappa Mudaliar* v *Additional First Class Magistrate, Kuli'alai*[1] also a weaving establishment was dealt with There also the workmen were under no obligation to come and work on any particular day They were free to come at any time and go at any time and work on bed-sheets and towels They could not be prevented from working for a competing manufacturer This is also a feature that obtains in the present establishment. But Balakrishna Ayyar, J, at page 751 of the report after referring to the above features observed :-

> "The petitioner cannot tell him that he should work on towels and not on bed-sheets or *vice versa* If the worker so pleases, he can work on towels though the petitioner would prefer him to work on bed-sheets"

But as observed above, here the employer had clear control over the workers on the type of cloths they had to manufacture, whether they were bed-sheets or dhothies and they were required to work on the premises of the employer The employer was clearly interested in seeing that the workers manufactured the clothes which he has specified and according to the directions which he had specified regarding their quality, etc It is legitimate to infer that in such circumstances the employer would have exercised constant supervision over the process of weaving to ensure that the required quality of the product is turned out from the power-looms or handlooms as the case may be

Taking up *Shankar Balaji* v *State of Maharashtra*[2] it was a case where the factory was engaged in the rolling of beedies which were given to workers for being rolled. The Supreme Court found that the appellant had no control or supervision over the details of the rolling of beedies The management simply told the labourers to produce beedies rolled in a certain form How the labourer carried out the work was his own concern and was not controlled by the management which was concerned only with getting beedies rolled in a particular style with certain contents

On the other hand the Supreme Court decision in *Dharangadhara Chemical Works Limited* v *State of Saurashtra*[3] had laid down the principles for distinguishing a contract of service from a contract for service The principal requirement of a contract of service is the right of the master in some reasonable sense to control the method of doing the work, the nature or the extent of the control must necessarily vary from business to business and is by its very nature incapable of precise definition. In the present case it is clearly established that the master had a voice in the selection of the goods to be manufactured and also in the quality of the goods He had also provided that the work should be done in his own premises by the workers even though they might be paid at a piece rate basis In the above circumstances it will be a necessary concomitent of the agreement between them, that the management will have constant supervision over the work of the labourer, to ensure that the labourer does not waste the warp that the management had supplied to him, and that the net product that emerges from the loom, conforms to the specified requirements of the employer One can visualise the management insisting that the weaving of threads should be sufficiently close, that the threads used from time to time are not broken too frequently, leading to too many knots in the woven fabric All these are incidental details of supervision in a situation like the present, when a master-weaver engages a number of workers to work at looms in his own factory

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1 I L R (1958) Mad 999 (1958) M L J (Crl) 699 (1958) 2 M L J 346 (1958) 2 L L J 744.

2 (1962) 2 S C J 426 (1962) M L J (Crl) 577 A I R 1962 S C 517

3 (1957) S C J. 208 (1957) 1 L L J 477.

for producing articles according to his stipulation, and of the desired quality and desired variety I therefore, find that the Tribunal below was right in holding this to be a contract of service and not a contract for service, and that the provision of the Employees' State Insurance Act are attracted.

The Writ Petition is dismissed. No order as to costs.

V K — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT MR JUSTICE P S. KAILASAM.

A Thandavaraya Chetty .. *Petitioner**

v.

The District Khadi and Village Industries Officer, Kancheepuram and another *Respondents.*

Madras Co-operative Societies Act (LIII of 1961), *sections* 27 (1), *Second proviso and* 27 (3) (b)—*Respective scope—Non-official member of Committee nominated by Government or Registrar—Term of office.*

While the second proviso to section 27 (1) of the Madras Co-operative Societies Act enables the Government or the Registrar to nominate members of the committee for such period as may be specified in the bye-laws, section 27 (3) (*b*) prescribes that the term of office of a member of the committee nominated by the Government or Registrar, when such member is a non-official, shall be three years. Reading the two provisions together, it is clear that the period of three years would be applicable to non-official members nominated by the Government or the Registrar, only in cases where there are no bye-laws of the society If the bye-law provides for appointment for a specific period, the second proviso to section 27 (1) will be applicable.

In the instant case as the bye-law makes provision for appointment for such period as the Registrar may consider necessary, the appointment of the petitioner as the President and Director for a period of one year is valid and he cannot take advantage of section 27 (3) (*b*) and claim that the appointment should have been for 3 years

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records connected with the proceedings of the District Khadi and Village Industries Officer, Kancheepuram, dated 12th November, 1967, and made in his Rc No 5598/67E and quash the same.

G Desappan, for Petitioner

T. Selvaraj, for Government Pleader, for Respondent.

The Court made the following

ORDER—This petition is filed by the President of the Athimancheripet Oil Producers Co-operative Society Ltd , for the issue of a writ of *certiorari* calling for the records connected with the proceedings of the District Khadi and Village Industries Officer, Kancheepuram dated 12th November, 1967 in Rc No 5598 of 1967, nominating a President and six directors to the society and to quash the same

The society was registered under the Madras Co-operative Societies Act, 1961 on 31st March, 1964, and started functioning from 14th June, 1964 The petitioner was appointed as a member of the Board of Directors and President of the Society by the Deputy Director (Industrial Co-operative), Madras, on 19th May, 1966, for a period of one year According to the appointment order the petitioner's period as

* W. P. No. 3557 of 1967 — 19th January, 1968.

Director and President expired on 19th May, 1967 The petitioner challenges the validity of the order dated 12th November, 1967, on the ground that according to section 27(3)(*b*) the term of office of a member of any committee nominated thereto by the Government, the Registrar or the financing bank, if such member is a non-official, shall be three years Because of this section, learned Counsel for the petitioner submits that though the appointment was for one year from 19th May, 1966, it should in effect be for three years and will continue upto 19th May, 1969

Section 27 provides for the appointment of committees for the management of the affairs of the registered societies Section 27 (1) provides that the general body of a registered society shall constitute a committee in accordance with the bye-laws and entrust the management of the affairs of the registered society to such committee. We are not concerned with the first proviso to section 27 (1). The second proviso reads as follows:

> " Provided further that where the bye-laws so provide, the Government or the Registrar may nominate all or any of the members of the committee for such period as may be specified in the bye-laws "

This proviso has a general application regarding societies which were formed after the commencement of the Act The by-law of the society was amended on 18th April, 1966, and bye-law No 19-A as it stands reads as follows :

> " 19-A Notwithstanding anything contained in these bye-laws the Registrar of Industrial Co-operatives shall be competent to nominate the Board of Directors including the President and the Vice-President from time to time for the first three years and may at his discretion nominate the directors for such period as he deems fit provided the total period does not exceed nine years in the aggregate. The Registrar of Industrial Co-operatives may in the interests of the society terminate the nomination of any director at any time and nominate another in his place.
>
> Any vacancy that may arise in the Board so nominated during the course of the above period shall be filled by the Registrar of Industrial Co-operatives."

According to the provisions of bye-law 19-A the Registrar may at his discretion nominate directors for such period as he deems fit provided the total period does not exceed nine years in the aggregate. While the second proviso to section 27 (1) enables the Government or the Registrar to nominate members of the committee for such period as may be specified in the bye-laws, section 27 (3) (*b*) prescribes that the term of office of a member of the Committee nominated by the Government or the Registrar when such member is a non-official, shall be 3 years Reading the two provisions together, it is clear that the period of three years would be applicable to non-official members nominated by the Government or the Registrar, in cases where there are no bye-laws of the society If the bye-law provides for appointment for a specific period, the second proviso to section 27 (1) will be applicable In this case, as bye-law 19-A makes provision for appointment for such period as the Registrar may consider necessary, the appointment of the petitioner as the President and director for a period of one year is valid and he cannot take advantage of section 27 (3) (*b*) and claim that the appointment, is for three years The appointment, therefore, expired on 19th May, 1967, and the impugned order appointing a president and six other directors on 12th November, 1967, cannot be questioned

This writ petition is, therefore, dismissed. There will be no order as to costs.

V.K. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. JUSTICE N. KRISHNASWAMY REDDY

J. Chelliah . *Petitioner**

v.

Rajeswari . *Respondent.*

Penal Code (XLV of 1860), *section* 499, Exception 9 *and section* 500—*Defamation—Describing a woman that she has paramours wherever she goes*—Per se *defamatory—Person claiming benefit of* Exception 9 *to section* 499 *to discharge the burden.*

Describing a woman that she has paramours wherever she goes, is scandalous and will bring down the reputation of the woman concerned to a considerable extent in the eyes of the public. It is *per se* defamatory. Once the petitioner (accused) has admitted that he was responsible for the defamatory statement, it is for him to discharge the burden while claiming the benefit of *Exception* 9 to section 499, Indian Penal Code, that he made the allegation in good faith. It is true that the petitioner need not let in evidence to show that he acted in good faith. But at least, there must be materials on record for the Courts to infer that the petitioner acted in good faith. Applying the principle laid down in *Harbhajan Singh* v. *The State of Punjab*, (1966) 1 S.C.J. 753 : (1966) M.L.J. (Crl.) 435 : (1965) 3 S.C.R. 235 : A.I.R. 1966 S.C. 97, it was held that the probabilities are not in favour of the petitioner to infer good faith.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the District and Sessions Judge, Coimbatore, dated 9th February, 1966 in C.A. No. 180 of 1965 (C.C. No. 726 of 1964 on the file of the Additional First Class Magistrate, Coimbatore).

C. Harikrishnan, for Petitioner.

B. Sriramulu, for Respondent.

Calvin Jacob for the Public Prosecutor, for State.

The Court made the following

ORDER.—The revision petitioner, Chelliah, is accused 2 in C.C. No. 726 of 1964 on the file of the Additional First Class Magistrate, Coimbatore. The petitioner was charged along with accused 1 and 3 originally under section 500, Indian Penal Code, but he alone was convicted under section 500, Indian Penal Code, and sentenced to pay a fine of Rs. 200 by the learned Additional First Class Magistrate. On appeal, the conviction and sentence were confirmed by the learned Sessions Judge, Coimbatore. There are no merits in this revision petition.

The only point that has been raised by the learned Counsel is that even assuming that the allegations made by the revision petitioner were *per se* defamatory, the lower Courts must have held that he made such allegations in good faith and in the interests of his sisters claiming the benefit of *Exception* 9 to section 499, Indian Penal Code. Both the Courts below have negatived the contention of the petitioner. To appreciate the contentions raised by the learned Counsel for the petitioner, it may be necessary to note the facts of the case briefly.

Accused 1 Satyanathan is a bus operator in Salem. One Thambithurai was the son of accused 1's brother. The petitioner and accused 3 are the cousins of the said Thambithurai. Accused 2 was also the Manager in the bus transport business of accused 1. On 16th February, 1964, Thambithurai married P.W. 1 Rajeswari against whom the allegations in question were made, as per Hindu rites and customs, after converting himself into Hinduism. After the marriage, P.W. 1 and Thambithurai were living as husband and wife in Sankaraidrug in Salem district. P.W. 1 conceived. On the night of 14th August, 1964, about six months after the marriage,

* Crl. R.C. No. 1115 of 1966
(Crl. R.P. No. 1094 of 1966.) 4th April, 1968.

Thambithurai met with a car accident and died on the next day. Thambithurai was possessed of considerable properties, both movables and immovables He had a car which was involved in the accident. At the time of the accident, Thambithurai had a cash of Rs. 7,000, diamond ring and other valuables P.W 1 was having the keys for the Godrej safe and other almirahs in which the valuables were kept. After the death of Thambithurai, accused 1 approached P W 1 and told her that it would not be proper for P.W. 1 to keep the keys as she was young. Saying that he would settle the matter in respect of the properties of Thambithurai, he took the keys from P.W. 1 and also took the cash, diamond ear ring and other valuables. As the sisters of Thambithurai began to give trouble to P.W 1, she came away to her house in Coimbatore. She later approached accused 1 for settlement. But he did not care to take interest in the matter.

On 19th October, 1964, P.W. 1 Rajeswari caused a lawyer's notice to be issued to the three accused stating that they had misappropriated the valuables taken by them from her custody and that they had driven her out of the house in collusion with the sisters of Thambithurai. The petitioner and the other two accused sent a reply on 21st November, 1964 through their Counsel,which is the subject-matter of the prosecution. In that notice, they denied that Rajeswari was the wife of Thambithurai and that the child in the womb of Rajeswari was not conceived through Thambithurai If the revision petitioner and the other accused had stopped with this, probably they would be justified in having made such allegations by way of defence to the notice issued to them by P W. 1. But the following further allegations made in the notice are not disputed that they are *per se* defamatory :

> "Your client is a Koothadichi She has paramours wherever she goes Your client or the alleged child in the womb are not entitled to succeed to the estate of B Alfred or claim in any share of the same."

This notice is in English. P.W. 1 does not know English language The notice received by her Advocate was passed on to Rajeswari's (P W. 1's) brother Shanmugham P.W 1 approached P.W. 2 Vellingiri to translate the contents of the notice. P.W. 2 acordingly translated the contents of the notice to Rajeswari and others from her house in the presence of other neighbours P.Ws 3 and 4 When P Ws. 3 and 4 heard the imputations read over, they felt that Rajeswari (P W. 1) was described as a debaucherous girl There cannot be any doubt that describing a woman that she has paramours wherever she goes, is scandalous and will bring down the reputation of the woman concerned to a considerable extent in the eyes of the public It is, therefore, *per se* defamatory. The petitioner does not dispute the fact that the notice was issued under their instructions and that the allegation was made in the notice by the Advocate on the petitioner giving instructions to the Advocates. But the contention of the petitioner is that he made this allegation in good faith in the interests of the sisters of Thambithurai, and claimed the benefit of *Exception* 9 to section 499, Indian Penal Code.

Once the petitioner has admitted that he was responsible for the defamatory statement it is for him to discharge the burden while claiming the benefit of *Exception* 9 to section 499, Indian Penal Code, that he made such allegation in good faith and in the interests of the sisters of Thambithurai He has not discharged that burden in this case. He does not contend that the allegations were true. Nor is he able to say as to how he got information that P W. 1 was going after paramours There is absolutely no warrant for any inference to be drawn from any circumstance brought on record that the petitioner honestly believed that P.W. 1 was going after paramours It is true that the petitioner need not let in evidence to show that he acted in good faith. But at least, there must be materials on record for the Courts to infer that the petitioner acted in good faith As already noted, such materials are absent in this case. The allegation that P.W. 1 was not married to Thambithurai or that the child was not conceived through Thambithurai,, might be justifiable as it will be necessary in the interests of the parties in the nature of things to make such an imputation, whether it is fully true or false. The petitioner has undoubtedly ex-

ceeded in having made such an irresponsible statement which he was not able to substantiate even to the slightest extent that P W. 1 was having paramours wherever she went. Though the petitioner may be said to be interested in making the allegations, the allegations were too violent for the occasion and disproportionate to the facts of the case.

In *H Singh* v. *State of Punjab*[1], the Supreme Court held that where to the charge of defamation under section 500, Penal Code, the accused invokes the aid of *Exception* 9 to section 499, good faith and public good have both to be established. The failure to prove good faith would exclude the application of the *Ninth Exception* in favour of the accused even if the requirement of public good is satisfied The Supreme Court further observed that where the accused is called upon to prove that his case falls under an Exception, law treats the onus as discharged if he succeeds in proving the preponderance of probability. Applying this principle, I am unable to say in this case that the probabilities are in favour of the revision petitioner to infer good faith.

The petition is dismissed.

S.V J. *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE T. VENKATADRI.

K. Anantha Narayanan .. *Petitioner**

v.

The State of Madras, represented byt he Assistant Collector, Pudukottai . *Respondent.*

Constitution of India (1950), *Article* 20 (2)—*One department of the Government punishing the Government servant for an offence and another department proceeding against him for the same offence—If opposed to Article* 20 (2) *of the Constitution*

The offence committed by the petitioner was that he unauthorisedly altered the date of his birth in his S S L.C. book For that offence, the Director of Public Instruction suspended his certificate for one year. The Madras Public Service Commission also debarred the petitioner from appearing for the future selections and examinations to be conducted by the Commission. As the petitioner was punished once by a department of the Government, the Assistant Collector dropped further action in the matter Thereafter the Government revived the proceedings once again by framing a different charges for the same offence and punish petitioner severely. When one department of the Government has punished a person for an offence, another department of the same Government cannot proceed against the person for the same offence, in order to give him more deterrent punishment. This is opposed to what is contained in Article 20 (2) of the Constitution.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in R C R. 9 No. 364/64, dated 4th February, 1964 of the Assistant Collector, Pudukottai, Tiruchirapalli district, and quash the order made therein.

N. Srivatsamani, for Petitioner.

The Assistant Government Pleader, for Respondent.

The Court made the following

ORDER.—This is a writ petition to quash an order, dated 4th February, 1964 of the Assistant Collector, Pudukkottai, removing the petitioner from service as attender

1 (1966) 1 S C J 753 · (1966) M L J (Cr) 435 · (1965) 3 S C R. 235 A I R 1966 S C 97

*W. P No 2122 of 1965. 19th April 1968

The petitioner joined service in 1953 as attender in the Deputy Tahsildar's Office, Pudukottai He completed his probation in the cadre of attender on 9th September, 1957. He was given a fitness certificate to sit for the Madras Public Service Commission examination held by the Commission in October, 1957. As he failed to come out successful, the petitioner again applied in 1958 But this time, the Commission rejected his application, on the ground that he had unauthorisedly altered his date of birth in the S S L C book from 6th April, 1931 to 6th April, 1933 He was also directed to show cause as to why he should not be debarred from appearing for the future selections and examinations conducted by the Madras Public Service Commission The petitioner's S.S L C book was sent to the Commissioner for Government Examinations, Madras The petitioner was asked to submit an explanation on a similar charge by the Commissioner for Government Examinations The petitioner submitted his explanation to the Secretary of the Madras Public Service Commission and also to the Commissioner, Government Examinations. Not satisfied with his explanation, the Director of Public Instruction, in memorandum, dated 24th October, 1958, suspended the certificate for one year with effect from 23rd October, 1958

In the meantime, the Assistant Collector of Pudukottai (Kumari Satyabama) also framed a charge that the petitioner unauthorisedly altered the date of his birth in his S.S.L C book from 6th April, 1931 to 6th April, 1933 The petitioner was directed to show cause why he should not be removed from service Finally, in proceedings L Dis 34266/58, dated 7th December, 1958, the Assistant Collector ordered that, as the petitioner had been punished once by the Director of Public Instruction for the unauthorised alteration of his date of birth in his S S L C. book, and that, inasmuch as the rule prohibited punishment for the same offence twice, further action was dropped The Public Service Commission also, by its Memorandum, dated 5th January, 1959, debarred the petitioner from appearing for the future selections and examinations to be conducted by the Commission

However, in G.O. Ms No. 900 Public (Services-B) Department, dated 18th March, 1959, the Government ordered that the petitioner be debarred, in pursuance of the letter of the Commission, dated 14th February, 1958 containing a list of black-listed persons. The Collector of Tiruchirapalli in his letter, dated 3rd March, 1959 directed the Assistant Collector of Pudukkottai to take disciplinary action. The petitioner was accordingly issued a charge memo on 31st July, 1959 Meanwhile the appeal of the petitioner against the order of the Public Service Commission was also rejected The petitioner submitted his explanation to the fresh charge. Finally, the Assistant Collector of Pudukkottai (Kumari Satyabama had been transferred by this time) passed the impugned order removing the petitioner from service.

Learned Counsel for the petitioner contended that the charge framed against the petitioner a second time for the same offence was in violation of all principles of natural justice and was also opposed to Article 20 (2) of the Constitution of India.

The only point for consideration is whether the order of the Assistant Collector, dated 4th February, 1964 is illegal as opposed to Article 20 (2) of the Constitution.

It is common case that the offence committed by the petitioner was that he unauthorisedly altered the date of his birth in his S.S L C book from 6th April, 1931 to 6th April, 1933. For that offence, the Director of Public Instruction suspended his certificate for one year The Madras Public Service Commission also dabarred the petitioner from appearing for the future selections and examinations to be conducted by the Commission. As the petitioner was punished once by a department of the Government, the Assistant Collector dropped further action in the matter. The order of the Assistant Collector of Pudukottai, dated 7th December, 1958, in so far as is relevant to the present case, runs thus .

"As the individual has been punished once and as the rule prohibit punishment for the same offence twice, further action is dropped."

Article 20 (2) of the Constitution provides that no person shall be prosecuted and punished for the same offence more than once The conditions for the applicability of this Article are (1) there must have been a previous prosecution, (2) the accused person must have been punished at such a prosecution, (3) the subsequent proceedings must also be one for the prosecution and punishment of the accused person, and (4) the proceedings on both the occasions must be in relation to the same offence. Applying the conditions to the facts of the present case, we find that there was a previous proceeding against the petitioner by the Public Service Commission as well as by a department of the Government That proceeding ended in a punishment to the petitioner That department of the State Government was quite competent to inflict the punishment on the petitioner, and it had jurisdiction to do so. It was because of that, the then Assistant Collector dropped further action by the department wherein the petitioner was working

For the same offence of alteration of date of his birth in the S S L C book, the petitioner was charged again by the Assistant Collector of Pudukottai, under rule 17-B of the Madras Civil Services Classification and Control Order. This I think the Government cannot do, in this case For the same offence, one department of the State Government competent to proceed against the petitioner has charged him and punished him also. The petitioner has also been debarred by the Public Service Commission That was why the then Assistant Collector (Kumari Satyabama) dropped further action by her department I think that the Government cannot revive the proceedings once again by framing a different charge for the same offence and punish the petitioner severely While I agree that departmental proceedings against public servants are not criminal prosecution and so such proceedings can be taken against a person who has already been prosecuted, convicted and sentenced in a criminal case, I cannot agree, that, when one department of the Government has punished a person for an offence, another department of the same Government can proceed against the person for the same offence, in order to give him a more deterrent punishment This is opposed to what is contained in Article 20 (2) of the Constitution The order passed by the Assistant Collector on 4th February, 1964 is, therefore, illegal, and it is quashed

The writ petition is allowed There will be no order as to costs

V M K, ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE M NATESAN

Narayana Chettiar .. *Appellant* *

v.

Rangaswamy Naidu and others . *Respondents.*

Limitation Act (IX of 1908), Article 132—" When the money sued for becomes due "—Meaning of—Mortgage, a combination of a simple mortgage and an usufructuary mortgage—Right of redemption after the expiry of five years—Mortgagee demanding payment more than 12 years after the expiry of 5 years—Money, if did not become due for lack of demand by mortgagee—Suit by mortgagee, if barred by limitation

The mortgage in the present case is a combination of a simple mortgage and an usufructuary mortgage, i e , a possessory mortgage containing a personal covenant for payment On the date of the mortgage itself the mortgaged properties were leased by the mortgagee to the mortgagor for a period of five years The plaintiff mortgagee by notice demanded in the year 1959, the mortgage money from the mortgagor, that is 32 years after the execution of the mortgage deed.

Is the plaintiff's suit barred by limitation under Article 132 of the Limitation Act ?

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*S A No 1027 of 1963. 7th July, 1967

Held that the starting point of limitation under Article 132 is when the money sued for becomes due The question for consideration in this case is when the money became due under the personal covenant in the mortgage deed in question. It is admitted that on the expiry of 5 years period provided in the deed, the mortgagor would get the right to redeem, that is, the money has become due for exercise of right of redemption What is contended for the plaintiff-appellant is that even though the mortgagor could redeem at any time, after the expiry of the 5 year period, provided the right of redemption is exercised at the close of the Chitrai month in any year, so far as the personal covenant is concerned the money did not become due under the personal covenant till a demand for the money was made.

Applying the test laid down in *Secretary of State for India* v. *Prasad Bapuli*, (1923) I.L R 46 Mad 259 : 44 M L J 685 to the effect whether the expression "on demand" used in an instrument are mere words or whether looking at the whole document, it was really intended that the demand should be made before even the liability to pay arises, it cannot, in this case, be said that liability to pay arose only on demand being made. The money became payable on the expiry of 5 year period. The provision as to redemption on the payment of the principal amount and the words "provided that the redemption should be at the close of the agricultural season on demand in any year" should all go together If the contention of the appellant is to be accepted that money became due under the instrument only on demand, the mortgagee could by not making any demand, postpone redemption The clause would then become a clog on redemption.

Applying the test of capacity of the charge-holder to collect the unpaid money laid down in *Padmavati* v *Ananteswarar Temple*, (1958) 1 M.L.J 197, clearly in this case the appellant could have claimed the principal amount immediately on the expiry of the 5 year period Money becoming due both for the purpose of redemption under section 60 and for the suit for sale under section 67 of the Transfer of Property Act, on the expiry of 5 year period, the cause of action for the suit for sale of the mortgaged properties arose in 1932 and the suit having been filed in 1959 is barred by limitation.

Appeal against the decree of the Sub-Court, Vellore, in A S. No. 97 of 1962 preferred against the decree of the District Munsif of Tiruvannamalai in O.S. No. 236 of 1960.

D. Ramaswami Ayyangar and *R. Krishnamachari*, for Appellant.

G Natarajan, for Respondents.

The Court delivered the following

JUDGMENT :—In this Second Appeal by the plaintiff mortgagee in a suit for sale, the question involved is one of limitation. The mortgage is a combination of a simple mortgage and an usufructuary mortgage, that is, a possessory mortgage containing a personal covenant for payment. The mortgage deed is Exhibit A-1, dated 17th May, 1927, securing a sum of Rs 1,000, under the terms of the mortgage the plaintiff mortgagee was to enjoy the properties mortgaged in lieu of interest for a period of five years and the mortgagor undertook to repay the mortgage amount when wanted in any year at the close of the agricultural season *i e*, சித்திரை காலாவதி after the expiry of the period of five years and redeem the mortgage. It is stated that on the date of the said mortgage itself, the mortgaged properties were leased by the mortgagee to the mortgagor for a period of five years, Exhibit A-5 being the lease deed According to the plaintiff, the mortgagor enjoyed the properties under the lease but paid only for three years. He defaulted in the payment of rent thereafter and refused also to surrender possession of the properties to the plaintiff However, it is only on 16th October, 1959, the plaintiff, by notice demanded the mortgage money from the mortgagor. The suit claiming a sum of Rs 2,530 75, principal and interest due under the mortgage, was filed on 18th April, 1960. The plaintiff

would have it that as he made the demand for the mortgage money only on 16th October, 1959, the cause of action for the suit arose only on that date and that the suit filed within 12 years from that date was in time The contention has been that it is only on demand of the money that the money became due and payable under the mortgage Both the Courts below have negatived this contention and dismissed the suit.

There is no dispute before me that the mortgage deed contains a personal covenant to pay Once in the deed a personal covenant could be read, the mortgagee gets a right of sale. Section 67 of the Transfer of Property Act entitles a mortgagee, in the absence of a contract to the contrary, at any time after the mortgage money has become due to him, and before a decree has been made for the redemption of the mortgaged property or the mortgage money has been paid or deposited as provided in the Act, a right to obtain from the Court a decree that the property be sold. Clearly, the suit for sale has been laid by virtue of the said provisions. Though clause (*a*) of section 67 provides that nothing in that section shall be deemed to authorise any usufructuary mortgagee as such to institute a suit for sale, the mortgage under consideration, admittedly being not usufructuary mortgage pure and simple, the suit for recovery of the money by sale is competent. I may here itself refer to section 60 of the Transfer of Property Act which provides for the exercise of the right of redemption by the mortgagor. This could be exercised at any time after the principal money has become due It is the common case of the parties that the relevant Article of the Limitation Act applicable to the suit is Article 132 of Act IX of 1908 . It reads :

Description of suit.	*Period of limitation.*	*Time from which period begins to run.*
To enforce payment of money charged upon immovable property.	Twelve years.	When the money sued for becomes due.

The starting point of limitation under Article 132 is when the money sued for becomes due The question for consideration in this case, is when the money became due under the personal covenant in the mortgage deed in question It is admitted that on the expiry of the five year period provided in the deed, the mortgagor would get the right to redeem, that is the mortgage money has become due for the exercise of the right of redemption What is contended for the plaintiff is that even though the mortgagor could redeem at any time, after the expiry of the five year period, provided the right of redemption is exercised at the close of Chitrai month in any year, so far as the personal covenant is concerned, the money did not become due under the personal covenant till a demand for the money was made. Counsel for the appellant lays stress on the expression "when you want" referring to the mortgagee, that is, when wanted by the mortgagee in the clause providing for payment and redemption by the mortgagor at the close of the agricultural season. The clause provides that on the expiry of the five year period, when wanted by the mortgagee in any year at the close of Chitrai, the mortgagor shall pay the principal amount and redeem the usufructuary mortgage. According to the learned Counsel money became due under the mortgage only when demand was made and in this case the plaintiff has made the demand only in October 1959, no doubt more than 32 years after the execution of the mortgage deed.

In support of his contention, learned Counsel relied on the *Secretary of State for India* v. *Prasad Bapuli*[1]. My attention was drawn particularly to certain observations at pages 288 and 289 of the report. At page 289 it is observed :—

"The question to be considered is whether the words 'on demand' are mere words, or whether, 'looking at the whole document, it is really intended that the demand should be made before the liability to pay arises.'"

Earlier, it was observed :—

"According to the law of England when money is payable on demand and nothing further is said, it is payable at once and without demand and time under the Statute of Limitations begins to run at once. The most common instance of the application of that principle are of money lent repayable on demand or at request and promissory notes payable on demand."

The test, as pointed out in this decision, is whether the expression 'on demand' used in an instrument are mere words or whether looking at the whole document, it was really intended that the demand should be made before ever the liability to pay arises. Applying that test, it cannot, in this case, be said that the liability to pay arose only on demand being made. The money became payable on the expiry of the five year period. Admittedly, the mortgagor could redeem at any time after the expiry of the five year period. The provision as to redemption on payment of the principal amount and the words "provided that the redemption should be at the close of the agricultural season on demand in any year" should all go together. If the contention of the learned Counsel for the appellant is to be accepted that the money became due under the instrument only on demand, the mortgagee could by not making any demand, postpone redemption. The clause would then become a clog on redemption. But learned Counsel concedes that it would be open to the mortgagor to redeem at any time and there is no covenant or prohibition against redemption at any time after the expiry of the five year period, except for the provision that it must be at the close of the agricultural season. Clearly, the money becomes due on the expiry of the five year period. Counsel would, however, state that viewed as a simple mortgage, money does not become due till demand is made. But I am unable to split and read the clause that way. If the money had fallen due for redemption at the expiry of the five year period equally, for the purpose of recovery of the money on the personal covenant, it should in the circumstances, be held to have fallen due at the same time. Learned Counsel referred me to the decision in *Kuttiasan* v. *Suppi*[2]. In that case the intention to postpone the right of suit was, on the construction of the document, held very clear. The decision proceeded on the language of the instrument and the Court was satisfied, on the construction of the document, that the parties intended that there should be a demand after the creditor attained his majority. One other case that was relied on by the appellant is the decision of the Judicial Committee in *Nilakanto Balwant Nathu* v. *Vidya Narasinga Bharathi Swami*[3]. There it was no doubt held that money did not become due and the cause of action did not arise until demand for the payment of the mortgage money was made by the mortgagee. But it will be seen that their Lordships of the Judicial Committee found, on the terms of the document concerned, that there was no specific time fixed for the payment of the debt. It was therefore, held that the money did not become due until a demand was made. Here, clearly the document provides a five year period for redemption and the right of redemption arose on the mortgage money falling due.

For the respondents, reliance was placed on *Lasadin* v. *Gulab Kunwar*[4]. From this judgment it is only necessary to extract the following observation at page 452 :

1. (1923) I.L.R. 46 Mad. 259: 44 M.L.J. 685.
2. (1893) 3 M.L.J. 199.
3. L.R. (1930) 57 I.A. 194: 59 M.L.J. 379: A.I.R. 1930 P.C. 188.
4. L.R. 59 I.A. 376: 63 M.L.J. 187: I.L.R. (1932) 7 Luck. 442 (P.C.).

"They (their Lordships of the Judicial Committee) are not prepared to hold that the mortgagor could in this way take advantage of his own default; they do not think that upon such default he would have the right to redeem, and in their opinion the mortgage money does not 'become due' within the meaning of Article 132 of the Limitation Act until both the mortgagor's right to redeem and the mortgagee's right to enforce his security have accrued"

In *Padmavathi* v. *Ananteswarar Temple*[1], the term in an indemnity bond ran as follows.—

"So the sum of Rs 3,000 is retained with you (the vendee) till such time as a proper release deed exonerating the property from the liability under the bond is obtained in your favour You should pay interest on the said amount of Rs 3,000 at 3½ per cent per annum on the 14th June every year and you should pay us the principal amount thus kept in suspense in your hands as soon as the release mentioned above is procured in your favour"

The appellant therein filed the suit contending that for the purpose of limitation the money became due under Article 132, only on execution of the release deed This contention was accepted by the District Judge and in rejecting it this Court observed:—

"The interpretation of this clause accepted by the learned District Judge would lead to the absurd result that if for some reason or other the party interested in getting the release deed postpones or abandons such getting, the starting point of the period of limitation will be indefinitely postponed We entirely agree with Mack, J, when he says that this term in Exhibit A-2 (indemnity bond) was intended only for the benefit of the vendee The plaintiff in the suit, the appellant before me, could not take advantage of this clause by causing P W. 1 to execute a release deed in 1942, nine years after the period of limitation had run out, and then claim a new starting point of limitation from that date The true principle is that the unpaid purchase money became due, that is payable according to the true construction of Exhibit A-2, the moment the liability under Exhibit B-1 was extinguished either by efflux of time or otherwise or by voluntary act of parties like execution of the contemplated release deed"

The learned Judges point out that the term 'when the money becomes due' in Article 132 of the Limitation Act should be construed with reference to the capacity of the charge-holder to collect the unpaid money. Applying that test, clearly in this case the appellant could have claimed the principal amount immediately on the expiry of the five year period Counsel for the respondent drew my attention to the decision in *Pt Gopi Nath* v *Pt Bhana Shankar Yajnik*[2]. In that case the mortgage deed provided as follows —

"When the creditor desires to demand money from us they may give us a six months' notice, after the expiry whereof, it will be open to them to take proceedings in Court according to law"

Construing this provision, a Division Bench of the Allahabad High Court held.—

" . therefore, we are satisfied that the intention of the parties was that the mortgage was not to be for a period It was open to the mortgagor to pay the mortgage amount at any time he liked It was open to the mortgagee to claim the amount immediately after the execution of the mortgage deed If, however, the mortgage money was claimed and was not paid, the mortgagee wanted to file a suit the deed provided that the mortgagee would be entitled to file a suit on the expiry of the period of six months This was merely to save unnecessary expenses being incurred in the filing of the suit and to enable the mortgagor to arrange for the money and pay it up to the mortgagee It cannot therefore be said that the mortgagee had no cause of action to file a suit before the expiry of six months."

1 (1958) 1 M L J 197. 2. (1954) A.L J 336.

In the present case, for the convenience of the mortgagee, the clause provided that the repayment should be at the close of the agricultural season. That does not mean that the money became due under the personal covenant only after a demand was made by the mortgagee. In my view money becomes due in this case both for the purpose of redemption under section 60 and for the suit for sale under section 67 of the Transfer of Property Act, on the expiry of the five year period.

Learned Counsel for the appellant finally drew my attention to the Full Bench decision of this Court in *Venkataswami Chetti* v *Ramalinga.*[1] The following passage therefrom, I should say, is decisive and clearly against the appellant's contention before me :

> " Without hesitation we accept as being correct the decisions of this Court which say that when a mortgage bond provides that the mortgage money shall be payable on demand it becomes repayable at once and limitation starts from the date of the bond The question then is whether the position is altered when the words used are ' when required by you' or 'whenever demanded' In our judgment such expressions mean 'on demand'. They are usually literal translations of words used in bonds written in the vernacular, the vernacular expression being intended to convey the same meaning as the English expression ' on demand'. We consider that there must be something more in a mortgage deed than this to justify the Court in holding that the cause of action on the bond only arises when a demand has in fact been made. To construe the words 'when required by you' as meaning something more than 'on demand' would in our judgment be putting a forced construction on the words. . . "

Learned Counsel for the appellant referred to the observations in this judgment to the effect that parties to a mortgage deed can agree that the principal sum shall not become payable until a demand is actually made The learned Judges immediately observe that this must be clearly expressed But here, the tamil expression corresponding to " when you demand " are, as observed in *The Secretary of State for India* v *Prasad Bapuli*[2], at the most mere words carrying no specific import But in the context that this is a usufructuary mortgage cum simple mortgage, the expression in fact emphasises the personal covenant, and provides the right to demand the money Doubts expressed in certain cases whether the clause in the instruments considered for payment and redemption could at all be read to contain a personal covenant, are cleared up in the said document recognising the mortgagee's right to demand the money It is clear that money becomes due, either from the point of view of the mortgagor to redeem or from the standpoint of the mortgagee to sue for sale, on the expiry of the five year period Counsel for the appellant Sri D Ramaswami Aiyangar urged that he relied on the very fact that this is a composite mortgage for his contention that the words " on demand " have special significance and the demand, is necessary to make the money due I am unable to see the special significance sought to be attributed to these words. In a pure usufructuary mortgage there could be no demand for the mortgage money. Here specifically right to demand this mortgage money as in a simple mortgage is conferred Only there should be neither redemption by the mortgagor nor demand for the mortgage money by the mortgagee for a period of five years. The ' on demand' in this case clearly means immediately on the expiry of five years.

In the result, it follows that the cause of action for the suit for sale of the mortgaged properties also arose on the expiry of the five year period, that is in 1932 Clearly, therefore, the suit filed in 1959 is barred by limitation The Second Appeal fails and is dismissed with costs. No leave

V M.K. *Second Appeal dismissed.*

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1 I L R (1945) Mad 758 · (1945) 1 M L J. 233 . A I.R 1945 Mad 157 (F.B).

2. 44 M.L J 685. I L.R. (1923) 46 Mad. 259

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE N KRISHNASWAMY REDDY.

T. S. Baliah ... *Petitioner**

v.

T. S. Rangachari, Income-tax Officer, Central Circle VI, Madras-34 .. *Respondent.*

Penal Code (XLV of 1860), *section* 177—*Offences—Prosecution—False statements by assessee in declarations under the Income-tax Act—Complaints under the Income-tax Acts of* 1922 *and* 1961 *and Indian Penal Code—Valid and sustainable in law—Offences under the Penal Code—Wider in scope than offences under the Income-tax Acts—Subject-matter of the two enactments—Not identical—No express or implied repeal of provisions of Penal Code by provisions in Income-tax Act—Prosecution under the repealed Act—Saved by the new Act—"Proceedings for assessment"—Proceedings include prosecution.*

Constitution of India (1950), *Article* 14—*Equality clause—Income-tax Act—Returns filed by assessees before the commencement of the new Act and returns filed after such commencement—Valid and justifiable classification.*

Statute—Repeal and re-enactment—Rights under the repealed Act—Savings—Extent of—Offences committed when the repealed Act was in force—No obliteration of such offences by re-enactment—Prosecution under the old Act—Valid.

Words and Phrases—" Proceedings"—" Proceedings for assessment."

Income-tax Act (XI of 1922), *sections* 52, 53.

Income-tax Act (XLIII of 1961), *sections* 277, 297 (1), 297 (2) (a).

General Clauses Act (X of 1897), *section* 6.

Four complaints were filed against the petitioner by the Income-tax Officer in respect of assessment years 1958-59 to 1960-61 alleging that he had been systematically filing false returns of his income and had omitted to give true information regarding his professional earnings liable to be taxed from the year 1957, with a view to evade payment of tax and he had deliberately concealed material particulars of his income in spite of notices having been issued by the Department to file a true and correct statement of income. The complaints relating to the first three assessment years were filed before the Chief Presidency Magistrate, Madras, under section 52 of the Income-tax Act of 1922 and under section 177, Indian Penal Code. The fourth complaint in respect of the assessment year 1961-62 was filed under section 277 of the Income-tax Act, 1961 and under section 177, Indian Penal Code. The petitioner raised a preliminary objection before the Presidency Magistrate contending that complaint under section 177, Indian Penal Code, is not maintainable as the operation of the section was excluded by section 52 of the Income-tax Act of 1922 and that section 52 itself did not apply as the Act of 1922 had been repealed by the Act of 1961 and the complaint under the 1961 Act was bad as it violated Article 14 of the Constitution. The Magistrate dismissed the objection holding that these can well be taken during the trial. The petitioner applied in revision to the High Court.

Held, that the prosecutions are maintainable under the Acts in respect of all the assessment years.

Though section 177, Indian Penal Code, and section 52 of the Income-tax Act 1922 appear to be substantially the same, the former is wider in its scope whereas the latter confines only to the matters mentioned in the said section. Section 177, Indian

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*Cr. R C Nos 645, 646, 647 and 648 of 1967.
Cr. R. P. Nos. 637, 638, 639 and 640 of 1967. 14th February, 1968.

Penal Code, deals with the offence mentioned generally making any false information furnished by a person who is legally bound to give such information to any public servant, an offence, whereas section 52 of the Income-tax Act confines itself in respect of false information furnished in the verification submitted by the assessee to the Income-tax Officer It does not include even any false information furnished by an assessee in any proceeding under the Income-tax Act other than the verification mentioned in the said section.

The enactment of 1922 does not expressly repeal section 177, Indian Penal Code. In the absence of an express repeal, the Courts do not lean in favour of an implied repeal. The Court will always be against the repeal of an earlier statute when the Legislature has not expressly done so unless the Court finds that the provisions of two enactments are wholly incompatible or that the two statutes together would lead to wholly absurd consequences.

It has therefore to be considered whether the subject of both the enactments is the same and if so, whether the latter statute had taken away the entire subject-matter of the earlier Act, before the repugnancy or incompatibility between these two enactments are considered

Having regard to the Lists in the Constitution, 7th Schedule, the object and purpose of these two enactments are different The subject-matter of the offence under section 177, Indian Penal Code, is much wider and comprehensive than the subject-matter of the offence created under section 52 of the Income-tax Act of (1922) for the purpose of enforcing effectively the provisions of the said Act The Indian Penal Code is a penal statute whereas the Income-tax Act is fiscal and deals with revenue. The object and purpose of the two enactments being different and the offence under one enactment being wider than the other it would not have been intended by the later enactment to repeal the earlier.

If the subject-matter of the two enactments are not the same and if the subject-matter of the two sections are not identical the inconsistency or the repugnancy between these provisions will not be a bar for them to co-exist and stand together Only if it is found that the subject-matter of both the enactments and the subject-matter of both the offences are the same and identical, the question of inconsistency or repugnancy may arise and if the provisions of the earlier Act are repugnant or inconsistent with the latter, it can be presumed that the latter will prevail over the earlier and repeal the earlier.

Assuming that the two Acts are same and identical, differences and inconsistencies between these two provisions relating to compoundability or otherwise of the offence, persons who are to commence the prosecution, Judges who can try the offence, penalty, are not of such a nature as to preclude the operation of the enactments.

Section 297 (1) of the Act of 1961 repealed expressly the Act of 1922 and under clause (2) the matters referred to in clause (2) (*a*) to (*m*) have been saved notwithstanding the repeal.

Section 6 of the General Clauses Act emphasises that unless a different intention appears in the repealing Act, ordinarily any legal proceedings can be instituted in respect of any matter pending under the repealed Act if that Act was in force at the time of the repeal When a repeal is followed by fresh legislation on the same subject the provisions of the new Act would have to be examined, but only for the purpose of determining whether they indicate a different intention The line of enquiry would have to be not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them.

A careful scrutiny of the provisions of section 297 of the Act of 1961 will indicate that it was not the intention of the Legislature to take away the right of instituting prosecution under the repealed Act.

The term " proceeding " is a very comprehensive term and generally speaking means prescribed modes of action for enforcing a legal right and hence it necessarily embraces the requisite steps by which judicial acts were invoked. "Proceedings for the assessment" referred to under section 297 (2) (*a*) of the 1961 Act will include prosecution also and it is, therefore, saved.

The institution of prosecution is a necessary action to be taken for the purpose of levy, assessment and collections of, the tax including penalty. If on the other hand the Legislature intended to exclude and to destroy the right to institute prosecution it could have excluded such right expressly and specifically The institution of prosecution is only a last resort Even if prosecution is instituted, it is made compoundable These circumstances would show that the Legislature would not have taken away that discretion of the authorities to institute prosecution in respect of assessment, levy and collection of tax before the commencement of the Act of 1961.

Offences during the continuance of a statute can be prosecuted and punished even after its repeal where the repealing Act had not obliterated the offences committed when the earlier Act was in force The prosecution under section 52 of the Act of 1922 is not taken away by the repealing Act and hence it is competent.

The Inspecting Assistant Commissioner would be the person competent to institute prosecution under section 52 of the old Act. If prosecution is launched under the old Act which was in force at the time of repeal, the entire procedure provided under the old Act alone should be followed

Section 292 (2) (*a*) is not violative of Article 14 The discrimination made between the persons who filed the returns before the commencement of the new Act must be taken as one class and the persons who filed their returns after the commencement of the new Act as another This will be a justifiable classification.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Chief Presidency Magistrate, Egmore, Madras, dated 22nd May, 1967, and made in M P. Nos. 246 to 249 of 1967 in C C Nos 1804 to 1807 of 1967.

V. Ganapathisubramania Iyer, for Petitioner.

C. K Venkatanarasimhan, Special Public Prosecutor, for Respondent.

The Court made the following

ORDER.—The petitioner in all these cases is the same. They are dealt with together as the points raised are substantially the same.

The revision petitioner is a cine actor Four complaints were filed against him by the Income-tax Officer, Central Circle -6, Madras, alleging that he had been systematically filing false returns of his income and had omitted to give true information regarding his professional earnings liable to be taxed from the year, 1957, with a view to evade payment of tax and he had deliberately concealed material particulars of his income in spite of notices having been issued by the Department to file a true and correct statement of income The first three complaints relating to the assessment years 1958-59, 1959-60 and 1960-61 respectively were filed before the Chief Presidency Magistrate, Madras, under section 52 of the Income-tax Act, 1922 and under section 177, Indian Penal Code The fourth complaint which is in respect of the assessment year, 1961-62 was filed under section 277 of the Income-tax Act of 1961 and under section 177, Indian Penal Code

The revision petitioner raised preliminary objection before the learned Chief Presidency Magistrate in respect of the first three complaints on the grounds that the complaint under section 177, Indian Penal Code, was not maintainable in law as the operation of section 177, Indian Penal Code, was excluded to cases relating to income-tax matters, that the prosecution under section 52 of the Income-tax Act, 1922 will also not apply as it was repealed by the Income-tax Act of 1961 and that the sanction given by the Inspecting Assistant Commissioner of Income-tax was invalid.

In the fourth complaint, an additional ground was taken that section 277 of the Income-tax Act of 1961 is invalid and *ultra vires* of the Constitution of India and in excess of the administrative competence and opposed to Article 14 of the Constitution.

The learned Chief Presidency Magistrate dismissed the petitions holding that the points of law raised by the petitioner were such that could be agitated in the course of trial He, therefore, thought it unnecessary to give any finding on the points raised by the petitioner.

In respect of the first three complaints, the learned Counsel appearing for the petitioner contended, firstly, that the complaint under section 177, Indian Penal Code is incompetent as it must be deemed to have been impliedly repealed by the enactment of section 52 of the Income-tax Act, 1922 and secondly, the prosecution under section 52 of the Income-tax Act of 1922 is also incompetent as the Income-tax Act of 1961 repealed the earlier Act of 1922 and the proceedings in respect of prosecutions under the Income-tax Act of 1922 were not saved by the repealing Act of 1961 In respect of the fourth complaint, he further contended that section 277 of the Income-tax Act of 1961 is *ultra vires* offending Article 14 of the Constitution

To appreciate the contentions of the learned Counsel for the petitioner in respect of the first three complaints, it will be necessary to note the relevant provisions of the Indian Penal Code and the Income-tax Act of 1922.

Section 177, Indian Penal Code, is as follows:

> " Whoever, being legally bound to furnish information on any subject to any public servant, as such, furnishes as true, information on the subject which he knows or has been reason to believe to be false shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both . ."

Section 52 of the Income-tax Act, 1922 is as follows :

> " If a person makes a statement in a verification mentioned in section 19-A or section 20-A or section 21 or section 22 or sub-section (2) of section 26-A or sub-section (3) of section 30 or sub-section (3) of section 33, or furnishes a certificate under sub-section (9) of section 18, which is false and which he either knows or believes to be false or does not believe to be true, he shall be punishable, on conviction before a Magistrate, with simple imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

In this section, it may be relevant to note that by Act VII of 1939, the words ' be punishable, on conviction before a Magistrate, with simple imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both " were substituted for the words " be deemed to have committed the offence described in section 177 of the Indian Penal Code " Before the amendment, section 52 by its deeming clause adopted the offence under section 177, Indian Penal Code ; but after amendment, it has created a substantive offence under the Act with the same punishment as provided under section 177, Indian Penal Code.

Though section 177, Indian Penal Code, and section 52 of the Income-tax Act of 1922, appear to be substantially the same, the former is wider in its scope whereas the latter confines only to the matters mentioned in the said section Section 177, Indian Penal Code, deals with the offence mentioned therein generally making any false information furnished by a person who is legally bound to give such information to any public servant, an offence whereas section 52 of the Income-tax Act of 1922 confines itself in respect of false information furnished in the verification submitted by the assessee to the Income-tax Officer. It does not include even any false information furnished by an assessee in any proceeding under the Income-tax Act other than the verification mentioned in the said section It, therefore, appears that any false statement in the proceedings under the Income-tax Act other than the statements made in verification mentioned in section 52 will come within the mischief of section 177, Indian Penal Code. The facts constituting an offence under section 52 of the Income-tax Act may very well be an offence under section 177, Indian Penal Code. But the facts constituting an offence under section 52 of the Income-tax Act (as the scope of the latter, as pointed out already), is confined to the matters mentioned there-

in Section 26 of the General Clauses Act provides that when two or more statutes create an offence of the same nature, the offender shall be liable to be prosecuted and punished under either or any of those statutes, but shall not be liable to be punished twice for the same offence. *Prima facie*, from the facts of the present case, the prosecution of the petitioner under section 177, Indian Penal Code, and section 52 of the Income-tax Act of 1922, would appear to be competent by virtue of section 26 of the General Clauses Act. But even if both the charges are proved, there cannot be two punishments.

It is contended that section 177, Indian Penal Code, must be deemed to have been repealed as it is repugnant to section 52 of the Income-tax Act of 1922 as both cannot co-exist in view of certain material differences between these two sections. The differences are said to be as follows.

Section 177, Indian Penal Code, is non-compoundable whereas the offence under section 52 of the Income-tax Act is compoundable with the permission of the Inspecting Assistant Commissioner by virtue of clause (2) of section 53 of the said Act. The prosecution under section 177, Indian Penal Code, can be instituted by any public servant under section 195, Criminal Procedure Code, whereas the prosecution under section 53 of the Income-tax Act has to be instituted at the instance of the Inspecting Assistant Commissioner as provided under section 53 (1) of the said Act. An offence under section 177, Indian Penal Code, is triable by a Presidency Magistrate, a Magistrate of the First Class or Second Class whereas the offence under section 52 cannot be tried by a Second Class Magistrate unless specially empowered by the Central Government If penalty is levied under the Income-tax Act in respect of certain matters, no prosecution can be instituted by virtue of the provision under section 28 (4) of the Income-tax Act in respect of the same matters whereas there is no such bar under section 177, Indian Penal Code It is contended that both the provisions cannot co-exist as they are repugnant to each other.

Before we consider this aspect, it may be necessary to consider whether the Parliament intended to repeal section 177, Indian Penal Code, by enacting section 52 of the Income-tax Act. Both are Central Acts. It is very significant to note that the later enactment does not expressly repeal section 177, Indian Penal Code In the absence of an express repeal, the Courts do not lean in favour of an implied repeal The Court will always be against the repeal of an earlier statute when the Legislature has not expressly done so unless the Court finds that the provisions of the two enactments are wholly incompatible or that the two statutes together would lead to wholly absurd consequences. In this context, it will be worthwhile to note the passage at page 344 of Craies on Statute Law (5th edition) quoting Dr. Lushington in "The India"[1] which is as follows:

> "What words will establish a repeal by implication it is impossible to say from authorities or decided cases. If on the one hand the general presumption must be against such a repeal, on the ground that the intention to repeal, if any had existed, would have been declared in express terms, so on the other hand, it is not necessary that any express reference be made to the statute which it is intended to repeal The prior statute would, I conceive, be repealed by implication if its provisions were wholly incompatible with a subsequent one; or if the two statutes together would lead to wholly absurd consequences; or if the entire subject-matter were taken away by the subsequent statute"

It has, therefore, to be considered whether the subject of both the enactments is the same and if so, whether the later statute, namely, section 52 of the Income-tax Act had taken away the entire subject-matter of section 177 Indian Penal Code, before we consider the repugnancy or incompatibility between these two provisions To determine whether a later statute repeals by implication an earlier, it is necessary to scrutinize the terms and consider the true meaning and effects of the earlier Act. The Indian Penal Code is a codification of the common law offences, and comes under Item 1 in Concurrent List III of the VIIth Schedule under the head "Criminal Law, including all matters included in the Indian Penal Code at the commencement of the Constitution" This item excludes offences against laws with respect to any

1. (1864) 33 L J. Adm. 193.

of the matters specified in List I or List II The Indian Income-tax Act comes under Item 82 in List I "Taxes on income other than agricultural income." The purpose of the enactment of Income-tax Act is to assess and collect tax on income and to enforce the provisions of the said Act To achieve the said purpose, the Income-tax Act created offences of its own, providing punishment in respect of certain matters by virtue of the power conferred on the Parliament in Item 93 of List I, namely, offences against laws with respect to any of the matters in the List

The object and the purposes, therefore, of these two enactments are different. The subject-matter of the offence under section 177, Indian Penal Code, is much wider and comprehensive than the subject-matter of the offence created under section 52 of the Income-tax Act for the purpose of enforcing effectively the provisions of the said Act The Indian Penal Code is a penal statute whereas the Income-tax is fiscal and deals with revenue Can it be said in this back ground, that section 52 of the Income-tax Act though creates an offence similar to that of section 177, Indian Penal Code, but narrower in scope, takes away the entire subject-matter provided under section 177, Indian Penal Code. The object and the purpose of the two enactments being different and the offence under the enactment being wider than the other, I am of the view that it would not have been intended by the later enactment to repeal the earlier. That this could not have been the intention of the Legislature can be gathered from some of the provisions of the Income-tax Act itself, as for instances, in cases where penalty is levied in respect of certain matters provided in section 28 (4) of the Act, the prosecution is barred in respect of the same matter under that Act. If the intention of the Legislature was that the prosecution would be barred even under any other enactment like the Indian Penal Code in respect of the same matter, it would have said so specifically that the prosecution is not only barred under the Income-tax Act but also under any other law In the absence of such a provision, it is reasonable to infer that the intention of the Legislature in creating offence under section 52 is not to repeal any other similar offence under any other law Both the statutes are two distinct enactments and they can certainly stand together.

The learned Counsel appearing for the petitioner relied upon the following decisions in support of his contention :

In the decision in *Fortescue* v. *Vestry of St. Matthew Bethnal Green*[1], it has been held that there was an implied repeal of section 72 of Michael Angelo Taylor's Act by section 119 of the Metropolis Management Act, 1855. While examining both the provisions of the earlier and later statutes, Charles, J, observed that both Acts deal with the question of paving and management of streets in the Metropolis. It is further observed at page 177 of the said decision as follows :—

> "It is true that section 72 of the earlier Act is not expressly repealed, but it is a well-recognised principle that an Act describing the quality of an offence, or prescribing a particular punishment for it, is impliedly repealed by a later Act altering the quality of the offence, or prescribing another punishment for it."

In the present case, as already found by me, the subject-matter of the two enactments, namely, Indian Penal Code and the Income-tax Act is not the same. The quality of the offence mentioned in section 177, Indian Penal Code, is not altered in section 52 of the Income-tax Act. Nor a different punishment is provided under the latter from what is provided under the former The punishment provided under both the sections is the same, namely, simple imprisonment of six months or a fine of one thousand rupees, or both.

In *Summers* v. *Helborn District Board of Works*[2], it was held that section 6 of the Metropolitan Streets Act, 1867 and section 1 of the Metropolitan Streets Act Amendment Act, 1867 repealed section 65 of the Michael Angelo Taylor's Act. In that case also, the subject-matter of both the Acts was the same and in the later Act, when there was a variation from the earlier which was entirely inconsistent with the later, it was held that there was an implied repeal of the earlier by the later statute.

1. L.R. (1891) 2 Q B. 170
2. L.R (1893) 1 Q B. 612.

Even in that case, Lord Coleridge, C J, observed that difficulties arise in determining whether there would be repeal by implication in the particular case before the Court.

In *Smith* v *Benabo*[1], it was held that section 75 of the General Paving Metropolis Act, 1817 was impliedly repealed by sections 122 and 123 of the Metropolis Management Act, 1855 There also the subject-matter of both the enactments was the same These decisions, in my opinion, do not support the contention of the petitioner.

The learned Counsel also relied upon a decision of the Supreme Court in *Harish Chandra* v *State of Madhya Pradesh*[2]. The point that arose in that case was whether the extension of the Essential Supplies (Temporary Powers) Act, 1946 and the Indian Scrap Order of 1943 to Madhya Bharat repealed the Madhya Bharat Essential Supplies (Temporary Powers) Act, 1948 and the Madhya Bharat Scrap Control Order. Here also, the subject-matter of the Central Act and the State Act was substantially the same. But the Supreme Court held that the State Act was repealed by the Central Act as the provisions were not identical and could not, therefore, stand together The Supreme Court pointed out that there were marked differences between the provisions of the two orders and found that it would not be possible for the two to stand together The Supreme Court observed as follows at page 937:

> " What we desire to emphasise is that the two orders, though achieving substantially the same object, are not identical in their provisions ' If that is so, it is obvious that on the extension to Madhya Bharat of the Indian Scrap Order, the Madhya Bharat Scrap Order would stand repealed and be replaced by the Indian law "

If the subject-matter of the two enactments are not the same and if the subject-matter of the two sections, namely, section 177, Indian Penal Code, and section 52 of the Income-tax Act, are not identical in that the earlier is wider and the latter is narrower in scope, the inconsistency or the repugnancy between these two provisions will not be a bar for them to co-exist and stand together Only if it is found that the subject-matter of both the enactments and the subject-matter of both the offences are the same and identical, the question of inconsistency or repugnancy may arise and if the provisions of the earlier Act are repugnant or inconsistent with the latter, it can be presumed that the latter will prevail over the earlier and repeal the earlier. The learned Counsel contended that the subject-matter of both the offences being the same and identical, they cannot stand together in view of the differences and inconsistencies between these provisions and that, therefore, section 177, Indian Penal Code, must be deemed to have been repealed by section 52 of the Income-tax Act, at least to the extent touching the matters provided under the later Act. I have already found that the subject-matter of the two enactments is not the same. But, however, assuming that they are the same and identical, we have to see whether there are differences and inconsistencies between these two provisions and if so, whether they are of such a nature that they could not stand together.

We have already noted the apparent differences between the two provisions, namely, (1) section 52 of the Income-tax Act is compoundable whereas section 177, Indian Penal Code, is not , (2) the prosecution under section 52 of the Income-tax Act is to be instituted at the instance of the Inspecting Assistant Commissioner whereas the prosecution under section 177, Indian Penal Code, is by any public servant provided under section 195, Criminal Procedure Code, (3) the offence under section 177, Indian Penal Code, is triable by a Presidency Magistrate, a Magistrate of the First Class or Second Class whereas the offence under section 52 cannot be tried by a Second Class Magistrate unless specially empowered by the Central Government ; and (4) if a penalty is levied under the Income-tax Act, the prosecution for any offence under that Act relating to the same matter for which the penalty has been levied, will be barred It has been already noted that there was no difference either in the procedure to be adopted in respect of trial of both these offences or in the matter of punishment

1 L R (1937) 1 K B. 518
2. (1965) 2 S.C.J. 649 . (1965) 1 S.C.R. 323 : A.I.R. 1965 S.C. 932.

These differences, in my opinion, are not at all inconsistent or repugnant to each other.

If the offence under section 52 of the Income-tax Act is compoundable, that may not be a reason to say that a person cannot be prosecuted under section 177, Indian Penal Code, since it is not compoundable There cannot be any dispute that a person can be prosecuted under both the enactments, if the facts disclosed the offences provided under the said enactments. If for instance, in the present case, it is shown that the offence under the Income-tax Act was compounded, that may be a defence for him when he is prosecuted under that section, but he cannot escape the prosecution under section 177, Indian Penal Code, if the facts disclosed offences under that section. If in a particular case, a person is prosecuted under several offences and some of them being compoundable, it cannot be said that the prosecution for non-compoundable offences along with compoundable offences is incompetent. If in such a case, the parties compound the compoundable offences, the prosecution could still continue with the trial of non-compoundable offences. Similarly, if the prosecution has to be instituted at the instance of the Inspecting Assistant Commissioner, for an offence under section 52 of the Act, it can still co-exist and stand together with the offence under section 177, Indian Penal Code, though the prosecution under that section could be instituted only by the public servant. If under both these sections a person is prosecuted and it is shown that the prosecution under any one of these two sections is incompetent for the lack of proper sanction, to that extent the prosecution will be void. For instance, if proper sanction was not obtained under section 52, but the sanction under section 177, Indian Penal Code, is properly obtained, the prosecution under section 52 will be incompetent whereas the trial under section 177, Indian Penal Code, can proceed. Even in respect of trial of both these offences, it is provided that a Presidency Magistrate or a First Class Magistrate can try ; but section 177, Indian Penal Code, can be tried by a Second Class Magistrate unless he is specially empowered by the Central Government. This, in my opinion, does not make any difference. If a person is prosecuted for two offences, one triable by a superior Court and the other by a lower Court, the superior Court can try both the offences In this case, the Second Class Magistrate cannot try the offence under section 52 of the Income-tax Act. Certainly, the First Class Magistrate or a Presidency Magistrate as the case may be, may try. In Craies on Statute Law—page 367—it is stated :

> " Thus an Act authorising trial by quarter Sessions can stand with an earlier Act enacting that the offence should be tried by the Queen's Bench or at Assizes."

If penalty is levied in respect of the matters mentioned in section 28 of the Act, by virtue of Clause (4) of the said section, no prosecution for an offence against that Act could be instituted in respect of the same facts.

Even here, I do not find any inconsistency between the provisions of the two enactments. The prosecution under this Act will be barred if penalty is levied. It can be defence in a prosecution under section 177, Indian Penal Code, and section 52 of the Income-tax Act, that the prosecution under section 52 is barred because of the imposition of penalty and if true, the result would be that the prosecution under section 52 could be dropped; but still, the prosecution under section 177, Indian Penal Code, would continue As already noted, it is very significant to note that section 28 (4) has barred the prosecution in respect of an offence under that Act, namely, the Income-tax Act. Section 28 (4) of the Act runs as follows :

> " No prosecution for an offence *against this Act* shall be instituted in respect of the *same facts* on which a penalty has been imposed under this section "

This provision does not, therefore, bar a prosecution for an offence under any other Act in respect of the same facts if they constitute an offence Even assuming these differences exist, it cannot be said that both the provisions are wholly incompatible or the application of both would lead to absurdity. Section 177, Indian Penal Code, is a common law offence.

In Archbold's Criminal Pleading Evidence and Practice, 34th Edition, page 4, it is stated that :

"If the offence is one which was already an offence at common law and the statute merely prescribes a new penalty or a new remedy, the remedy at common law is not taken away except by express negative words."

It is, therefore, clear that even if a new remedy is provided under the later Act, it does not take away the offence under the common law. The learned Counsel relied upon the decision in *Smith* v. *Benabo*[1]. In that case, the proceedings were taken under a statute which has been repealed instead of being taken under one which was in force. In that case, section 122 of the Metropolis Management Act, 1855 in substance described exactly the same offence as that which was described by section 75 of the General Paving Metropolis Act, 1817. But the latter Act provided different penalties and procedure from those imposed and prescribed by the earlier Act. In that context, Goddard, J., observed as follows at page 525 :

" . . it is a well-settled rule of construction that if a later statute again describes an offence created by a previous one, and imposes a different punishment, or varies the procedure, the earlier statute is repealed by the later statute."

The Supreme Court also reiterated the same principle in *Zaverbhai Amaidas* v. *The State of Bombay*[2], in the following terms :

" It is a well-settled rule of construction that if a later statute again describes an offence created by a previous one and imposes a different punishment or varies the procedure, the earlier statute is repealed by the later statute "

In the instant case, we have noted more than once that the punishment imposed and the procedure prescribed in both the enactments are the same and there are no variations The procedure to be adopted in the trial of the offence under both the enactments is summons procedure and there is no variation between these two enactments in respect of the procedure. Therefore, this decision will not apply to this case.

The penalties imposed by statute for offences already punishable under a prior statute are regarded as cumulative or alternative and not as replacing the penalty to which the offender was previously liable.

Maxwell, on the Interpretation of Statutes, 10th Edition at page 186 states :

" It would seem that an Act which (without altering the nature of the offence, as by making it felony instead of misdemeanour) imposes a new kind of punishment, or provides a new course of procedure for that which was already an offence, at least at common law, is usually regarded as cumulative and as not superseding the pre-existing law "

In page 369 of Craies on Statute Law, it is stated thus :

" Subsequent Acts of Parliament in the affirmative, giving new penalties and instituting new modes of proceedings, do not repeal former methods and penalties ordained by preceding Acts without negative words "

In *Om Prakash* v. *State of U P* [3], in dealing with the point whether the Prevention of Corruption Act, 1947, repealed section 409, Indian Penal Code, as far as public servants are concerned, it was observed that the Legislature would not have intended in the normal course of things that a temporary statute like the Prevention of Corruption Act should supersede an enactment of antiquity, *viz.*, the Penal Code even if the matter covered the same field.

In *The State* v *Pandurang*[4], it was held by the Full Bench that section 409, Indian Penal Code, was not impliedly repealed by the Prevention of Corruption Act as it was impossible to say that the provisions of the two were wholly incompatible or that the two statutes together would lead to wholly absurd consequences. It was pointed out in that case that there were inconsistencies between the two enactments in that the Prevention of Corruption Act provided a different procedure in respect of trial, sanction, evidence, etc After giving due consideration to these inconsistencies, applying section 26 of the General Clauses Act, Chagla, C J, on behalf of the Bench observed as follows at page 453 with which I respectfully agree :

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1. L R (1937) 1 K B 518
2. (1955) 1 S C R 799 (1954) S C J 851 : A I R. 1954 S C. 752
3 (1957) S C J 289 · (1957) S C R 423 : (1957) M L J (Crl) 237 : A I R 1957 S C 458.
4 A I.R. 1955 Bom. 451.

"...when section 26 provides that the offender shall be liable to be prosecuted and punished under either or any of those enactments, what the Legislature clearly intended was that that he shall be liable to be prosecuted according to the procedure laid down under the enactment under which he was being prosecuted, and in the Full Bench decision also the view that we have taken is that the special procedure set up under the Prevention of Corruption Act does not entitle a public servant to insist that the only proceeding which would be instituted against him must be under the Special Act and not under the Criminal Procedure Code.

Therefore, in our opinion, section 26 has application provided the same act has been constituted an offence under more than one enactment It makes no difference to the application of section 26 that the procedure laid down in the two enactments with regard to the prosecution of the offender is different or even if different sentences are provided under the two enactments . . . "

The Calcutta High Court in *Amarendra Nath Roy* v *State*[1], had taken a similar view.

For the foregoing reasons, I hold that section 52 of the Income-tax Act, 1922 has not repealed section 177, Indian Penal Code. Therefore, the prosecution under section 177, Indian Penal Code, in all the four complaints is competent.

In respect of the prosecution under section 52 of the Income-tax Act, 1922 in the first three complaints, it was contended by the learned Counsel for the petitioner that by the repeal by the Income-tax Act of 1961, the prosecution in respect of the prior proceedings under the earlier Act were not saved and that, therefore, the prosecution under section 52 of the repealed Act is unsustainable.

Section 297 (1) of the Income-tax Act, 1961, repealed expressly the Income-tax Act, 1922 and under clause (2), the matters referred to in clause (2) (*a*) to (*m*) have been saved notwithstanding the repeal of the Income-tax Act, 1922 It was contended that under clause (2) of section 297, the prosecution in respect of proceedings pending on the commencement of the Act of 1961 is not expressly saved and, therefore, it must be presumed that the Legislature had not intended to save prosecutions in respect of proceedings pending at the commencement of the said Act.

Section 6 of the General Clauses Act is as follows :

"Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not

(*a*) revive anything not in force or existing at the time at which the repeal takes effect , or

(*b*) affect the previous operation of any enactment so repealed or anything duly done or sufferred thereunder , or

(*c*) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed , or

(*d*) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed , or

(*e*) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid ;

and any such investigation, legal proceeding or remedy may be instituted continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the Repealing Act or Regulation had not been passed "

This section emphasizes, therefore, that unless a different intention appears in the repealing Act, ordinarily any legal proceeding can be instituted in respect of any matter pending under the repealed Act if that Act was in force at the time of repeal.

The principle under section 6 has been succinctly stated in *State of Punjab* v. *Mohar Singh*[2] which is follows :

"Whenever there is a repeal of an enactment, the consequences laid down in section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears In the case of a simple repeal there is scarcely any room for expression of a contrary opinion But when the repeal is followed by fresh legislation on the same subject the Court would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention The line of enquiry would be, not whether the new Act expressly

1 A.I.R. 1955 Cal 236 A.I.R. 1955 S.C. 84,
2. (1955) S.C.J. 25. (1955) 1 S.C.R. 893.

keeps alive old rights and liabilities, but whether it manifests an intention to destroy them The Court cannot, therefore, subscribe to the broad proposition that section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material The provisions of section 6 of the General Clauses Act will apply to a case of repeal even if there is simultaneous enactment unless a contrary intention can be gathered from the new enactment Of course, the consequences laid down in section 6 of the Act will apply only when a statute or regulation having the force of a statute is actually repealed "

It has, therefore, to be considered whether the repeal and the saving clause under clause (2) of section 297 has in fact destroyed the right to institute prosecution in respect of proceedings which were pending at the commencement of the Act A careful scrutiny of the provisions will indicate that it was not the intention of the Legislature to take away the right of instituting prosecution in the circumstances aforesaid.

Section 297 (2) (*a*) says that " where a return of income has been filed before the commencement of this Act by any person for any assessment year, proceedings for the assessment of that person for that year may be taken and continued as if this Act has not been passed " The question is whether the words " proceedings for the assessment of that person for that year" are so comprehensive, so as to include even the proceedings in respect of prosecution I am of the view that the words are comprehensive in the context and that would include every proceeding till the assessment is realised There cannot be any doubt, institution of prosecution is one of the modes to realise the amount assessed, besides the levy of punishment.

" Proceeding " is defined in Shorter Oxford English Dictionary as "a legal action or process , any act done by authority of a Court of law ; any step taken in a cause by either party " In Ramanatha Iyer's Law Lexicon, " Proceeding " is described as " an act necessary to be done in order to attain a given end, a prescribed mode of action for carrying into effect a legal right "

The term " proceeding ", therefore, is a very comprehensive term and generally speaking, means prescribed modes of action for enforcing a legal right and hence it necessarily embraces the requisite steps by which judicial acts are invoked In my view, the " proceeding " referred to under section 297 (2) (*a*) will no doubt include the prosecution also and it is, therefore, saved.

In *A N Lakshman* v *Income-tax Officer*[1], while considering the meaning of " assessment " as occurred in section 13 (1) of Finance Act, 1950, it was held that the word " assessment " must be taken in its comprehensive sense and the collection of words in the said section, namely, "levy, assessment and collection" would indicate that what was meant was the entire process by which the tax is ascertained, demanded and realised.

In *Income-tax Commissioner* v *M/s Bhikaji Dadabhai*[2], a point arose whether the words " levy, assessment and collection of income-tax" would include penalty. It was held that imposition of penalty being a necessary concomittant or incident of the process of assessment, levy and collection of tax would include penalty also. What happened in that case was that the Hyderabad Income-tax Act was repealed by the Finance Act, 1950 Sub-section (1) of section 13 of the Finance Act, 1960, provided :

" If immediately before the 1st day of April, 1950, there is in force in any Part B State any law relating to income-tax or super-tax that law shall cease to have effect except for the purposes of the levy, assessment and collection of income-tax and super-tax in respect of any period not included in the previous year for the purposes of assessment under the Indian Income-tax Act, 1922 .. ."

From this, it was contended that what was saved after repeal was only "levy, assessment and collection of income-tax" and penalty was not saved. The High Court

1 (1958) S C J 1023 (1959) S C.R 751 A.I.R. 1958 S.C. 795.

2. (1962) 1 S C J 554 (1961) 3 S.C R. 923 : A I.R. 1961 S.C. 1265.

held that "penalty" was not saved as it was not expressly provided and according to the High Court, what was saved was levy, assessment and collection of income-tax. The Supreme Court dissented from the view of the High Court and held that this will include "penalty" also and that the proceedings for imposing a penalty could be continued even though it was not specifically saved.

It was contended by the learned Counsel that section 297 (2) (*f*) saves any proceeding from the imposition of a penalty in respect of any assessment completed before the 1st day of April, 1962 and that, therefore, when penalty has been specifically saved, if the Legislature had intended to save prosecutions also, it could have specifically said so I am unable to agree with the contention of the learned Counsel. The institution of prosecution is a necessary action to be taken for the purpose of levy, assessment and collection of the tax including penalty If on the other hand, the Legislature intended to exclude and to destroy the right to institute prosecution, it could have excluded such right expressly and specifically. The institution of prosecution is only a last resort, if necessary to be adopted by the authorities, for the purpose of levy, assessment and collection of tax , Normally, prosecution is not restored to. Even if prosecution is instituted, it is made compoundable. These circumstances would show that the Legislature would not have taken away that discretion of the authorities to institute prosecution in respect of assessment, levy and collection of tax before the commencement of the Act of 1961.

The learned Counsel for the petitioner relied upon the decision in *Income-tax Commissioner, Bihar and Orissa* v. *Pratapsingh*[1] In that case, the Income-tax Officer issued notice to the assessee under the old section 34 on 8th August, 1948 for assessing the escaped income The assessment was completed on 26th August, 1948. Section 34 was amended by Act XLVIII of 1948 which came into force on 8th September, 1948 Proviso to section 34 after amendment required that the Commissioner must be satisfied that the case was fit for the issue of notice under section 34 It was held that the amended provision indicated a different intention which excluded the application of clauses (*b*) and (*c*) of section 6 of the General Clauses Act In that case, it is very significant to note, that though assent was obtained for the amendment to section 34 on 8th September, 1948, according to the proviso to that section, it was deemed to have come into force on 30th March, 1948 It is, therefore, clear by virtue of the proviso in that case that even in August, 1948 when notice was given by the Income-tax Officer, the amendment to section 34, namely, that the Commissioner must be satisfied that the case was fit for the issue of notice under section 34, was in force by virtue of the deeming clause This decision will not certainly apply to this case as the repealed Act was in force at the commencement of the repeal.

In *C. A Abraham* v *Income-tax Officer*[2], the Supreme Court observed that when interpreting a fiscal statute, the Court cannot proceed to make good deficiencies if there be any and it must interpret the statute as it stands and in case of doubt in a manner favourable to the taxpayer.

Taking into consideration that the institution of prosecution is not a part of the levy and assessment of tax, but a consequence of failure to do certain things provided in the Act, I do not think, any doubt can be entertained in respect of the interpretation of the saving clause Thus, offences during the continuance of a statute can be prosecuted and punished even after its repeal as the repealing Act had not obliterated the offences committed when the earlier statute was in force. I am, therefore, of the view that the prosecution under section 52 of the Income-tax Act, 1922 is not taken away by the repealing Act and the prosecution under that section is competent and sustainable in law. It was also contended by the learned Counsel that the repealing Act had provided under section 279 of the said Act that the Commissioner of Income-tax alone could sanction prosecution for the

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1. (1961) 2 An W R (S C) 27 · (1961) 2 S C J 176 (1961) 2 M L J (S C) 27 : (1961) 2 S.C R. 760 A I R. 1961 S.C 1026

2 (1961) 1 An W R (S C) 183 · (1961) 1 M L J (S C) 183 (1961) 1 S C J 673 (1961) 2 S C R. 765 : A.I.R. 1961 S C 609.

offence under section 277 of the Act, and that the prosecution in the present cases was sanctioned by the Inspecting Assistant Commissioner which would be invalid. There is no substance in his argument It is clear that under section 53 (1) of the old Act, the Inspecting Assistant Commissioner can institute prosecution under section 52 of the said Act, but whereas under the new Act, the Commissioner alone can institute prosecution under section 277 of the new Act which is similar to the offence under section 52 of the old Act. At the commencement of the new Act, sections 52 and 53 were in force. If that were so applying the principle laid down in the *Income-tax Commissioner* v *M/s. Bhikaji Dadabhai*[1], the Inspecting Assistant Commissioner would be the competent authority to institute prosecution under section 52 of the old Act If prosecution is launched under the old Act which was in force at the time of repeal, the entire procedure provided under the old Act alone should be followed.

In respect of the fourth complaint relating to the prosecution under section 277 of the Income-tax Act, 1961 which is a substantial reproduction of section 52 of the old Act, it is contended by the learned Counsel in addition to the points raised in the other three complaints that section 297 (2) (*b*) is violative of Article 14 of the Constitution in that it made a discrimination between the persons placed in similar position in respect of return of income filed after the commencement of the new Act for the assessment year ending on the 31st day of March, 1962 and persons who filed return of income for the said period before the commencement of the new Act. I do not see any force in this argument at all. The learned Counsel is unable to show as to how Article 14 is attracted. The discrimination made between the persons who filed the returns before the commencement of the new Act must be taken as one clause and the persons who filed their returns after the commencement of the Act as another In my view, this will be justifiable classification. As the Income-tax Act of 1961 in substance has reproduced the relevant provisions dealt with in the old Act in respect of the first three complaints, the points which were taken in the first three complaints apply to this also and since I have answered all those points, it may not be necessary to repeat the same

In the result, I find that there is no substance in any of the points raised by the learned Counsel and all the petitions are dismissed.

V.S. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE T. RAMAPRASADA RAO

Muthukumaraswami Pillai .. *Petitioner**

v.

Srimushnam Vedapatasalai, represented by its trustee Govindarajan . *Respondent.*

Madras Inam Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1963), *section* 3 (b) *proviso,* 67 *and* 71—*Suit by land-holder for possession of lands in the occupation of tenant and for other ancillary reliefs—Suit lands forming part of an erstwhile inam estate and notified under Madras (Act XXVI of* 1963)—*Suit filed after notification but before obtaining a ryotwari patta, on the ground that the suit lands were private lands of land-holder—Jurisdiction of Civil Court to entertain suit.*

Civil Procedure Code (V of 1908), *section* 9—*Ouster of jurisdiction of civil Court—When can be inferred.*

Where a landholder filed a suit for possession of certain lands in the occupation of the defendant as his tenant under a registered lease and for other ancillary reliefs

1. (1962) 1 S C.J. 554 · (1962) 3 S C.R 923 . A I.R. 1961 S C. 1265.

*C.R.P. No. 625 of 1967. 27th July, 1967.

such as rent or damages for use and occupation, on the ground that though the lands in question were inside an inam estate as defined by Madras Inam Estates (Conversion into Ryotwari) Act (XXVI of 1963), they were his private lands; and the defendant *inter alia* contended that the lands being an erstwhile inam estate and having been notified under Madras Act (XXVI of 1963) the plaintiff could not seek possession of the lands inside it without securing a ryotwari patta from the Tribunals constituted under that Act and that therefore the civil Court had no jurisdiction to entertain the suit:

Held, the civil Court had jurisdiction to entertain the suit and grant the reliefs prayed for.

To oust the jurisdiction of Civil Courts words of express import or significant expressions necessarily implying such ouster are required It is fundamental that such ouster of jurisdiction of the common Courts of the land ought not to be lightly inferred. When Tribunals which are creatures of statute are vested with certain functions and their ultimate decision regarding the same are not to be questioned in a civil Court, then it could only be said that, as regards matters to be decided by the Tribunals the civil Courts ought not to entertain any *lis* regarding the same. But it is a totally different thing to say that for all purposes there is an ouster of jurisdiction of civil Courts even in matters within the exclusive competence of the civil Courts.

In the instant case, it is the civil Court alone which can give the relief for possession and grant the other ancillary reliefs. No doubt it is the statutory Tribunal alone that is entitled to grant a ryotwari patta after due enquiry One salient fact to be remembered is that the Government has not disturbed the possession of the land-holder either under section 3 (*d*) or section 67 of the Madras Act (XXVI of 1963) and he is apparently continuing in lawful possession thereof in the *bona fide* expectation of his entitlement to a ryotwari patta The matters to be gone into by the civil Courts and that to be scrutinised by the Tribunals are by and large different, though incidentally the civil Court might have to consider certain matters coming in the lap of the jurisdiction of the Tribunals. Such an incidental consideration does not really encroach upon the special exclusive jurisdiction of statutory Tribunals.

Petition under section 115 of Act (V of 1908), praying the High Court to revise the order of the Subordinate Judge, Kumbakonam, dated 13th February, 1967, and made in Original Suit No 6 of 1966.

R. Kesava Ayyangar for *K. Yamunan,* for Petitioner.

V. Vedantachari, T. Rangaswami Ayyangar and *A. Venkatesan,* for Respondent

The Court delivered the following

JUDGMENT —This Civil Revision Petition filed by the defendant is directed against the order of the Subordinate Judge of Kumbakonam, whereby, he, while trying the issue on jurisdiction as a preliminary issue, upheld the jurisdiction of the Subordinate Judge's Court, Kumbakonam, to try the suit instituted by the plaintiff. The plaintiff filed a suit aginst the defendant for possession of certain lands in the occupation of the defendant as his tenant under a registered lease, dated 15th July, 1956 and for other reliefs His case is that the lands in question, though inside an inam estate within the meaning of section 3 (2) (*d*) of the Madras Estates Land Act (I of 1908) as amended in 1936 by Act (XVIII of 1936) and section 2 (7) of the Madras Inam Estates (Abolition and Conversion into Ryotwari) Act, (Madras Act (XXVI of 1963), are his private lands. The plaintiff has also prayed for other ancillary reliefs such as rent or in the alternative as damages for use and occupation. *Inter alia* the defendant contended that the lands are not the private lands of the plaintiff, that they are ryoti lands, that the Madras Estates Land (Reduction of Rent) Act, 1947, was extended to the village in question and it has since been notified under Madras Act (XXVI of 1963) and that the Government should be deemed to be in possession of the entire inam estate and that, therefore, the civil Court has

no jurisdiction to grant the reliefs prayed for A preliminary issue was framed reading as under .—

" Whether this Court has no jurisdiction and the suit is not maintainable as per the provisions of Madras Act XXVI of 1963 ".

The learned Subordinate Judge held that the Court had jurisdiction Sri R. Kesava Ayyangar appearing for the petitioners states that the order is wrong and that the civil Court has no such jurisdiction His main contention is that the estate having been notified and the village being an erstwhile inam estate, the plaintiff cannot seek possession of the lands inside it without securing a ryotwari patta from the Tribunals and that the issue of such a ryotwari patta is within the competence of the hierarchy of State Tribunals constituted under Madras Act XXVI of 1963, and this being a condition precedent, the plaintiff cannot force a trial on the other issues in the case, as the condition precedent for the institution of such a suit is not satisfied. Sri V. Vedantachariar arguing contra, urged that in the facts and circumstances of the instant case, there is no bar for the entertainment and trial of the suit, as the reliefs asked for cannot be granted by the Tribunals under Madras Act XXVI of 1963 and that Civil Courts can incidentally go into the question of title of the plaintiff while disposing of the suit While the learned Counsel for the petitioner would say that as the ultimate order to be passed by the Special Tribunals under section 71 of Madras Act XXVI of 1963, is final and not being liable to be questioned in a Civil Court, the Civil Court in this case ought not to have passed the impugned order; the respondent's case is that there is no such interdict in law and the suit is maintainable Both the learned Counsel have argued the case at length and placed relevant authorities in support of their respective contentions before me Before dealing with the weight of the respective contentions of the parties, the facts of the case and the import of the various relevant pieces of legislation touching the matter in issue has to be noted.

It is not in dispute that the village was originally an inam estate. But the bone of contention of the respondent as a landholder throughout was that the suit lands were its private lands It is represented that the respondent filed an application to the Collector under section 183 of the Madras Estates Land Act, 1908, for ascertaining and recording that the land is its private land. During the pendency of the said petition, an application for the appointment of a receiver was made and the prayer was granted. Civil Revision Petition No. 874 of 1961, was filed against the said order appointing a receiver. This Court passed an order in the following terms :—

" It is agreed on both sides that after this Civil Revision Petition was filed the Government has issued a notification on 27th September, 1961, under the provisions of the Rent Reduction Act, 1947. The question whether the land concerned is private or ryoti will have to be decided under the provisions of Act XXIX of 1956 The order of the lower Court appointing a receiver cannot therefore be sustained in the changed circumstances of the case It is set aside and the matter is remitted back to the lower Court, for taking appropriate action on the petition under the Act "

It is thus seen that a notification, dated 27th September, 1961, under the Rent Reduction Act (as it is commonly called) was issued so as to bring this village also in its clamp Under Madras Act XXIX of 1956, which caused certain amendments to the Rent Reduction Act, Tribunals were established to decide the question whether any land in a village is ryoti or not and the decision of such a Tribunal shall be final and shall not be liable to be questioned in a Court of law Consequent upon the constitution of the fresh statutory Tribunal under Madras Act XXIX of 1956, the application under section 183 of the Madras Estates Land Act, 1908, was transferred to the concerned Tribunal under Madras Act XXIX of 1956 Before the Collector, who was the authority to finally decide the matter, could pass final orders, the Madras Inam Estates (Abolition and Conversion into Ryotwari) Act, 1963 (Madras Act XXVI of 1963) was passed and a notification notifying the inam estate, in which the suit lands are situate, was made on 15th April, 1965. Conse-

quent upon such a notification, the Collector had to terminate the proceedings before him under Madras Act XXIX of 1956, and apparently the authorities under Madras Act XXVI of 1963, have not yet decided whether the plaintiff is entitled to a ryotwari patta to the lands on the strength of his claim as his private lands. In fact, such a contingency is envisaged under section 9 of Madras Act XXVI of 1963. Section 67 indeed enables the landlord to keep on his possession or right to possession in spite of temporary discontinuance of possession or occupation. Thus, prior to the institution of the suit on 20th January, 1966, the claim of the plaintiff to a ryotwari patta to the lands, on the basis of their being his private lands, was still undecided and the matter is still pending enquiry. It is at this stage the suit is filed and the petitioner as defendant has raised various defences as set out above, including the plaintiff's right to institute the action in a civil Court without securing a ryotwari patta from the Tribunals duly constituted for the purpose.

At this stage it would be convenient to refer to the scheme of Madras Act XXVI of 1963. The very set up and sequence of the provisions in Madras Act XXVI of 1963, is the same as that in Madras Act XXVI of 1948, that is, the Madras Estates (Abolition and Conversion into Ryotwari) Act. Section 71 which clothes the orders of the Settlement Officer or the Tribunal under that Act with finality and conclusiveness is to be read in conjunction with all the other sections in the Act and should not be dealt with *de hors* the rest of the Act. Section 3 deals with the consequences of notification of an inam estate. Section 3 (*b*) provides that on and after the notification, the entire inam estate shall vest in the Government free from all encumbrances. Section 3 (*c*) terminates all rights created by the landholder in or over the inam before the notified date. Section 3 (*d*) enables the Government to take possession after removing all obstructions. The proviso to section 3 (*d*) is significant. It runs as follows :—

> "Provided that the Government shall not dispossess any person of any land in the inam estate in respect of which they consider that he is *prima facie* entitled to a ryotwari patta pending the decision of the Settlement Officer and the Tribunal and the Special Appellate Tribunal, on appeal, if any, as to whether such person is actually entitled to such patta ;"

Section 3 (*e*) provides that the landholder is entitled to such rights and privileges as are recognised or conferred on him by or under this Act. Section 9 deals with the entitlement of the landholder to a ryotwari patta and the conditions required therein. Section 12 (1) enables the Settlement Officer to determine whether the landholder or the ryot as the case may be is entitled to a patta or not. An appeal is provided under section 12 (2) of the Act to the Tribunal. Section 71 deals with the finality of the orders passed by the hierarchy of Tribunals constituted under the Act and runs as follows :—

> "(1) Any order passed by any officer, the Government or other authority or any decision of the Tribunal or the Special Appellate Tribunal under this Act *in respect of matters to be determined for the purposes of this Act shall, subject* only to any appeal or revision provided by or under this Act, be final.
>
> (2) No such order or decision shall be liable to be questioned in any Court of law."

What is, therefore, the right to possession that is referred to in the proviso to section 3 (*d*) of Madras Act XXVI of 1963? In common law, a possessory right is a valid, justiciable and enforceable right ; it is good against all except the true owner. Madras Act XXVI of 1963, reiterates the said common law right in section 3 (*d*), proviso and in other sections. Section 67 is yet another section enabling the landlord to keep on his possession until a final decision on his application for ryotwari patta is taken by the statutory Tribunals or until the Government initially decides to remove him from possession consequent upon the notification of the inam estate. Neither of such events has happened in this case. On the other hand, the enquiry before the authorised Tribunals for the issue of a ryotwari patta is pending. If ultimately the plaintiff is successful in securing a patta it would take effect from

the date of the notification. As pointed out by Veeraswami and Krishnaswami Reddy, JJ, in *Mustafa* v. *Udayanchiammal*[1].

" .... the issue of patta is in recognition of the title that inhered before the notified date and continued to inhere in the landholder thereafter to the private lands but only with this difference that after the notification the tenure of the land is no longer pannai or private but, on grant of ryotwari patta, becomes ryotwari land subject to payment of assessment."

By the issuance of a patta, a declaration as to pre-existing right is made, though fictionally under the statute, it is given for the first time to him under its provisions. The question therefore, is whether a right for possession said to be inhered by the plaintiff can be agitated and pressed into service in a Civil Court notwithstanding the interdict in section 71 of Madras Act XXVI of 1963.

Reference was made to me to the case reported in *S. S. Khanna* v *F. J. Dillon*[2]. This was a case where the totality of the grant was under consideration That was not a case where a landholder, who claimed possession of his private lands and pending decision by the statutory tribunals regarding issue of a ryotwari patta came to Court for possession against a tenant or a trespasser. To oust the jurisdiction of Civil Courts, words of express import or significant expressions necessarily implying such ouster are required. It is fundamental that such ouster of jurisdiction of the common Courts of the lands ought not to be lightly inferred. When Tribunals which are creatures of statute are vested with certain functions and their ultimate decisions regarding the same are not to be questioned in a Civil Court, then it could only be said that, as regards matters to be decided by the Tribunals, the Civil Courts ought not to entertain any *lis* regarding the same. But it is a totally different thing to say that for all purposes there is an ouster of jurisdiction of Civil Courts even in matters within the exclusive competence of the Civil Court. In the instant case, it is the civil Court alone which can give the relief for possession and grant the other ancillary reliefs. No doubt it is the statutory Tribunal alone that is entitled to grant a ryotwari patta after due enquiry. The plaintiff has been asking for such a recognition and issue of patta even under section 183 of the Madras Estates Land Act, 1908. Nearly for nine years the matter is pending and no decision has been arrived at by the Tribunal, which, of course was changing from time to time along with the course of agrarian reforms. One salient fact to be remembered is that the Government has not disturbed the possession of the landholder and he is apparently continuing in lawful possession thereof in the *bona fide* expectation of his entitlement to a ryotwari patta Therefore, it is a matter in which the plaintiff is not circumventing the procedural law prescribed by Madras XXVI of 1963, by instituting the present suit. The matters to be gone into by the Civil Court and that to be scrutinised by the Tribunal are by and large different, though incidentally the Civil Court might have to consider certain matters coming in the lap of the jurisdiction of the Tribunals.

Such an incidental consideration does not really encroach upon the special exclusive jurisdiction of the statutory Tribunals Rajamannar, C J, and Ganapatia Pillai, J, in *Adakalathmmal* v. *Chinnayan Panipundar*[3], while considering section 56 (1), a similar provision in Conversion into Ryotwari Act (XXVI of 1948), held, approving the ratio in *Soosai Udayar* v *Andiyappan*[4], agreed that (at page 317)

" If the relief claimed in a Civil Court is not what is created or granted by the Act, *e g*, the right to obtain patta, but a Civil right the jurisdiction of the Civil Court which always existed, cannot be held to be ousted as the statute does not either expressly or impliedly extinguish such rights."

Veeraswami, J, in *Govindaswami* v. *Arumugham*[5], observed as follows (h.n) :—
" Section 3-A of the Madras Estates Land (Reduction of Rent) (Amendment Act), 1956, creates a special jurisdiction in the Collector to decide whether a land

1 (1968) 2 M.L.J 58. I L R. (1968) 1 Mad. 728, 756.

2 (1964) 4 S C R. 409 A I R. 1964 S C 497

3 (1959) 1 M L J 314

4 (1959) 1 M L.J. 195

5 (1962) 2 M L.J 368 I L R (1962) Mad. 336.

in a village is or is not ryoti land. It does not take away the jurisdiction of Civil Courts to decide the question as to the character of any land in a suit, incidentally for the purpose of granting a relief within its purview. The fact that a special jurisdiction is vested in the Collector to decide a particular fact cannot by implication take away the jurisdiction of the Civil Court to decide a similar question incidentally to grant a relief which it otherwise has "

Again, a Division Bench of the Andhra Pradesh High Court in *Sriramamurthy* v. *Batchu Dhanaraju*[1], had to consider a similar issue. The learned Judges held .

" Under proviso (*ii*) to section 3 (*d*) of the Madras Estates (Abolition and Conversion into Ryotwari) Act, the Government shall not dispossess a landholder of any land in any estate in respect of which they consider that he is *prima facie* entitled to a ryotwari patta pending the decision of the Settlement Officer and the Tribunal on appeal, if any, to it as to whether he is actually entitled to such patta. If the suit land is a private land of which the landholder is entitled to possession under the said proviso he is entitled to continue in possession. The Government is not entitled to dispossess him and he is surely entitled to evict any trespasser from the land There is nothing in the Act to support the view that the landholder has no right to possession of private land until he gets a ryotwari patta in respect of it under section 12. As regards clause (*c*) of sub-section (1) of section 56 which says that any dispute as to who is the lawful ryot in respect of any holding shall be decided by the Settlement Officer But the word ' ryot ' has the same meaning as under the Madras Estates Land Act, 1908, and the question as to who is a ryot can arise only in respect of ryoti land. Once the land is private land, the question as to who is the lawful ryot in respect of it does not arise and the matter does not therefore, fall within the jurisdiction of the special tribunals set up under the Act As such the Act XXVI of 1948 is no obstacle to the maintainability of the suit "

To the above same effect, but in a more forcible manner proposition of law has been set by Subbarao, C J (as he then was of the Andhra Pradesh High Court) and Ranganadham Chetty, J , in *Appanna* v. *Ramamurthy*[2], in the following terms :

"When a statute confers a power on any person for public purposes from which an individual may receive an injury, if the mode of redressing the injury is pointed out by the statute, the jurisdiction of the ordinary Courts is ousted and where a special tribunal out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of that Act, then except so far as is otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive "

Mr Kesava Ayyangar, however, referred to a Bench decision of this Court in *Hariharamuthu* v *Subbulakshmi*[3] This was a case which arose in a transitional period when Act XXX of 1956, was in force. The provisions of the said Act are not *in pari materia* in so far as its pith and substance is concerned, with the provisions under Madras Act XXVI of 1963 There was an express ban for the trial of suits by Civil Courts under Act XXX of 1956 There is no such ban under Act XXVI of 1963, either expressly or by necessary implication for the trial of suits, in which the Civil Court alone can give relief

Whether the lands are the private lands or ryoti lands are yet to be decided by the statutory Tribunals constituted for the purpose It is not as if the respondent is guilty of any laches on his part in that he did not seek an adjudication on the issue whether the lands are non-ryoti in character He has been diligent, but no orders have been passed so far by the Tribunal Significantly enough there is an interdict against landholders instituting suits for recovery of rents as regards ryoti lands, ryoti lands defined in Act XXX of 1947, attracts the old Estates Land Act, 1908, but there is no corresponding injunction against the landholders to institute actions

1. (1957) 1 An W R. 332
2. I L R (1958) A P 396, 405
3. (1960) 1 M L J. 232 . I L.R. (1960) Mad. 315.

against the tenants who were inducted into such possession by a contract or a lease, in respect of lands claimed as their private lands and for the declaration as such, of which, steps have been taken from time to time before the statutory Tribunals constituted for the purpose

This is not a case in which a bare assertion is made by the respondent that the lands are his private lands, for the first time in the plaint in question He has been persisting in it long prior to the notification of the estate under Act XXX of 1947 and indeed under the Estates Land Act Mr Kesava Ayyangar has not cited before me any authority for the proposition that even in such circumstances the jurisdiction of Civil Courts are ousted to adjudicate upon a suit for possession and rent instituted by a landholder against a tenant Ouster of jurisdiction of Civil Courts ought not to be lightly inferred Whereas there is a ban on the adjudication of such issue by Civil Courts when the statutory Tribunals have finally decided that the land is ryoti, there is no such ban in cases where such decisions have not yet been made though initiated by the landlord. There appears to me, to be, no bar for Civil Courts to try such suits for possession and rent or mesne profits when the statutory Tribunals have not yet decided the principal matter in controversy. The respondent has instituted this suit and is taking a risk as he is ultimately bound by the decision of the Tribunals. Whatever the landholder does has to necessarily enure to the benefits of the true owner, as found by the Tribunal ultimately

I, therefore, agree with the finding of the lower Court that the Civil Court has jurisdiction to try the suit. This Civil Revision ' Petition is dismissed with costs.

V.K. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE R SADASIVAM

S. K. Pothilingam Pillai and another .. *Petitioners**

v.

Nagoor Meeran Rowther .. *Respondent.*

Penal Code (XLV of 1860), *sections* 482 *and* 486—*Infringement of property mark—Conviction—Sub-Magistrate, if has no jurisdiction by reason of infringement of property mark also being an infringement of trade mark—Trade and Merchandise Marks Act (XLIII of* 1958), *sections* 78 *and* 79.

The question for determination is whether by reason of the infringement of the trade mark which is also evident from the complaints and which would amount to offences under sections 78 and 79 of the Trade and Merchandise Marks Act, 1958, the Sub-Magistrate would have no jurisdiction to entertain the complaints under sections 482 and 486, Indian Penal Code, on the ground that he would be clutching at jurisdiction of the First-Class Magistrate by ignoring obvious facts.

Held that the offence of infringement of trade mark is distinct from any offence of infringement of property mark In fact the existence of such a distinction is clear from the provisions in the Penal Code with regard to trade mark prior to the enactment of the Trade and Merchandise Marks Act, when the offences relating to both trade mark and property mark were triable by Sub-Magistrates The complaints of the respondent in the present case being only for infringement of his property mark by reason of the conduct of the petitioners in trying to pass off their goods as his goods, by adopting the property mark of the respondent, the contention that the Sub-Magistrate has no jurisdiction to try offences relating to infringement of the property mark of the complainant cannot be accepted

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise (1) the judgment of the Court of the Sub-Divisional Magistrate, Koilpatti, dated 16th December, 1965 and made in C A No 44 of 1965.

* Crl R C Nos 487 and 747 of 1966 and
Crl R.P Nos 480 and 731 of 1966 10th November, 1967.

confirming the judgment of the Court of the Sub-Magistrate, Sankarankoil, dated 20th October, 1965 and made in C C No 1846 of 1965 (Crl.R C No 487 of 1966), (2) the order made by the Court of the Sub-Magistrate (I), Tirunelveli in C M P. No. 266 of 1966, dated 26th Mary 1966 (Crl R P. No 747 of 1966).

S. Thyagaraja Iyer, for Petitioners.

K. Ramaswami, A Sarojini Bai, M. R Krishnan and T. Srinivasan, for Respondent.

R. Veeramani for the Public Prosecutor, for State.

The Court made the following

ORDER.—The petitioners in both these Revision Cases are the same. The first petitioner has been convicted under sections 482 and 486, Indian Penal Code, and sentenced to pay a fine of Rs. 50 on each count and in default to rigorous imprisonment for one month and the second petitioner has been convicted under section 486, Indian Penal Code, and sentenced to pay a fine of Rs. 50 and in default to rigorous imprisonment for one month, in C C No. 1846 of 1965 on the file of the Sub-Magistrate, Sankarankoil The criminal case was initiated on a private complaint filed by the respondent for an alleged offence of using false property mark imitating that of the complainant in manufacturing and selling bug poison. The complainant is a manufacturer and seller of a bug killer liquid called ' Byron ' and his concern is known as Laila Company. M. O. 1 is a card board box containing the bottle of bug killer. The second petitioner was originally working as an accountant under the complainant but he was discharged from service. The complainant's case is that the first petitioner manufactured bug killer by name ' Bairavan ' in bottles enclosed in card board box M O. 3, similar in shape, size and design to M O. 1 and that both the petitioners sold the said bug killer as that of the complainant

Both the petitioners have been prosecuted in the Court of the Sub-Magistrate (I), Tirunelveli, in C C. No 1739 of 1966 for again infringing the property mark of the respondent-complaint There the petitioners raised a preliminary objection that the complaint against them would also constitute offences under sections 78 and 79 of the Indian Trade and Merchandise Marks Act, 1958, that such offences are triable, according to section 89 of the said Act, by a Magistrate not inferior to a First-Class Magistrate and that they could not therefore be tried by a Sub-Magistrate The Sub-Magistrate overruled the objection and the petitioners have filed Crl. R. C. No. 747 of 1966 against that order. It is stated by the learned Advocate for the respondent that a case has been filed in the Court of the Sub-Divisional Magistrate, Koilpatti, against the petitioners for infringement of the trade mark of the respondent-complainant

The contention of the learned Advocate for the petitioners in both these cases is that the trial Court, namely, the Court of the Sub-Magistrate, had no jurisdiction to entertain the complaints by virtue of section 89 of the Trade and Merchandise Marks Act, as the offences alleged against the petitioners really fall under sections 78 and 79 of that Act. The further contention of the learned Advocate for the petitioners is that even if the facts alleged in the complaint of the respondent amount to offences both under sections 78 and 79 of the Trade and Merchandise Marks Act as well as under sections 482 and 486 of the Indian Penal Code, the Sub-Magistrate would be clutching at jurisdiction in trying the offences under sections 482 and 486, Indian Penal Code, ignoring the offences under sections 78 and 79 of the Trade and Merchandise Marks Act, 1958.

' Property mark ' is defined in section 479, Indian Penal Code, as a mark used for denoting that movable property belongs to a particular person 'Trade Mark' is defined in section 2 (*v*) of the Trade and Merchandise Marks Act as a registered trade mark or a mark used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right as proprietor to use the mark, in relation to Chapter X of that Act, and in relation to other provisions of that Act, as a mark used or proposed to be used in relation to goods for the purpose of indicating or so as to indicate a connection

in the course of trade between the goods and some person having the right, either as proprietor or as registered user, to use the mark whether with or without any indication of the identity of that person and includes a certification trade mark registered as such under the provisions of Chapter VIII of that Act. After the passing of the Trade and Merchandise Marks Act, offences relating to infringement of Trade Marks have been omitted in the Indian Penal Code leaving intact offences relating to property mark.

The term 'property mark', as used in the Indian Penal Code, is not known to English law. The distinction between trade mark and property mark is however found in the Indian Penal Code. If a person passes off the goods of another as his own, the English law provided a cause of action for the same which is independent of the cause of action for infringement of trade mark. It is pointed out in Ratanlal Law of Crimes that the distinction between a 'trade mark' and a 'property mark' is, that the former denotes the manufacture or quality or the goods to which it is attached and the latter denotes the proprietor of them.

I am unable to accept the contention of the learned Advocate for the petitioners that the complaint filed by the respondent is only for infringement of trade mark. In paragraph 2 of the complaint in C C No. 1846 of 1965 on the file of the Sub-Magistrate, Sankarankoil, the complainant has stated that in respect of his bug poison under his trade mark 'Byron' and in respect of shape of bottles and shape or size of card boards box, as stated in the previous paragraphs and with colour as found therein, they are distinctive of his goods and he has acquired property rights in respect of them. In fact in the subsequent paragraph the complainant has stated that the petitioners have been passing off their goods as his goods by infringing his property mark. A mere comparison of M Os 1 and 3 in the case is sufficient to convince the correctness of the findings of the Courts below that the petitioners have infringed the property mark of the respondent-complainant in C.C. No. 1846 of 1965. It is true the alleged infringement of property mark in the other case has yet to be enquired into. It is sufficient to state that the Sub-Magistrate, Sankarankoil, in the first Revision Case and the Sub-Magistrate (I), Tirunelveli in the second case had materials before them to take cognizance of the offence for infringement of property mark, punishable under sections 482 and 486 of the Indian Penal Code on complaint of the respondent in respect of the same.

The only other question to be considered is, whether by reason of the infringement of the trade mark, which is also evident from the complaints and which would amount to offences under sections 78 and 79 of the Trade and Merchandise Marks Act, 1958, the Sub-Magistrate would have no jurisdiction to entertain the complaints under sections 482 and 486, Indian Penal Code, on the ground that he would be clutching at jurisdiction by ignoring obvious facts. The offence of infringement of trade mark is distinct from an offence of infringement of property mark In fact the existence of such a distinction is clear from the provisions in the Penal Code with regard to trade mark prior to the enactment of the Trade and Merchandise Marks Act, when the offences relating both to trade mark and property mark were triable by Sub-Magistrates. At page 1240 of Ratanlal's Law of Crimes (Twentieth Edition), it is pointed out that if 'A' is known not to be the maker or manufacturer of the goods he sells, but only to have selected and put them up and he uses a certain mark to indicate to his customers that they will thus have the benefit of his skill in selection, then in the terminology of the Penal Code, the mark would be a property mark and not a trade mark, but if the main purpose of the mark were to indicate the quality of the goods, then even though 'A' was not the maker of them, it would be a trade-mark and not a property-mark Even in cases of goods with no trade mark or in cases in which the trade mark has not been registered, a person could have a cause of action both in civil and criminal Courts for infringement of property mark. It is only in respect of offences falling under sections 78 and 79 of the Trade and Merchandise Marks Act the complaint should be filed before the First-Class Magistrate. The complaints of the respondent in the cases before me are only for infringement of his property mark by reason of the conduct of the petitioners in trying to

pass off their goods as his goods, by adopting the property mark of the respondent. I am therefore unable to accept the contention of the learned Advocate for the petitioners that the Sub-Magistrate of Sankarankoil in the first case or the Sub-Magistrate (I) of Tirunelveli in the second case has no jurisdiction to try offences relating to infringement of the property mark of the complainant The Criminal Revision cases are therefore dismissed

V M.K ——— *Criminal Revision Cases dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT .—MR JUSTICE M NATESAN.

Marudanayagam Pillai .. *Appellant**

v

P K. Venkataswami Naidu and others . *Respondents.*

Civil Procedure Code (V of 1908), section 47—Scope—Mortgage decree—Decree-holder taking in execution land not included in decree—Judgment-debtor must apply under section 47—Separate suit incompetent—Conversion of suit into application under section 47—Discretion of Court.

Maxim—Falsa demonstratio non nocet cum de corpore constat—*Import and applicability of*

All questions arising between the parties to the suit, in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree have to be determined by the Court executing the decree and not by a separate suit If the decree-holder takes in execution land not included in the decree or in excess of the decree, the judgment-debtor must apply under section 47, Civil Procedure Code, for recovery of such land and a separate suit for that purpose will not lie.

Case-law discussed

Of course, it is open to the Court at any stage to convert a suit into an application, subject to the question of limitation. But it is a discretion vested with the Court

Obiter—When a dispute arises as to the property covered by a decree, normally boundaries prevail over numbers but circumstances may demand that the survey number should prevail over the descriptive boundaries, particularly when the descriptive boundaries are themselves vague and their identification difficult. There can be no inflexible principle in this The question for consideration always is, which part of the description is wrong Where lands are described by numbers and also by description of the boundaries and a mortgagor or other grantor owns lands sufficiently answering to one feature and not the other, the other will be rejected as a misdescription *demonstratio falsa non nocet cum de corpore constat* There must be available an adequate and sufficient definition of what is intended to pass for the principle to apply, and it must fit with certainty to one subject

Appeal against the decree of the Sub-Court, Tiruchirapalli in A S No 222 of 1954 preferred against O S No. 92 of 1952, District Munsif's Court, Tiruchirapalli.

A. V. Narayanaswami, for Appellant

S V. Jayaraman (*amicus curiae*), for Respondents

The Court delivered the following

JUDGMENT —This Second Appeal is by the first defendant in a suit for setting aside an earlier decree in a mortgage suit, O S. No. 634 of 1943 on the file of the District Munsif, Tiruchirapalli, for a declaration that the Court sale therein is not

* S.A. No. 1055 of 1962. 8th December, 1966.

valid and binding on the plaintiff and for restraining defendants 1 and 2 in the suit and their men and agents from interfering with the ownership and possession of the suit A schedule property in the possession of the plaintiff and his lessee, the third defendant in the suit, and for other reliefs. There has been no appearance before me for the legal representatives of the plaintiff, the plaintiff dying *pendente lite* As the record revealed that there has been hot contest between the parties, at the instance of the Court, Sri S V Jayaraman, Advocate, has appeared *amicus curiae* to represent the case for the contesting respondents

The earlier suit O S. No 634 of 1943 was instituted by the present appellant as plaintiff on a mortgage executed in favour of the predecessor of first defendant's assignor by one Gurunatha Asari. In that suit, the present plaintiff was made the second defendant and the second defendant in the present suit was impleaded as the fifth defendant Several items of properties were the subject of the mortgage and with reference to the impleading of defendants 2 to 6 in the mortgage suit, the plaint therein stated that defendants 2 to 6 were claiming rights in the properties by subsequent alienations or as tenants and that they were bound by the mortgage claim, that is the present plaintiff was impleaded as a person bound by the mortgage. He entered appearance in the first instance and filed his written statement wherein he *inter alia* pleaded that he was an unnecessary party to the suit as he claimed adversely to the mortgagor and his rights were paramount to that of the mortgagor and mortgagee. It was set out in his written statement that one Appavu Asari was the original owner of the properties and that the present plaintiff has acquired title to the property from him *bona fide* and for valuable consideration prior to devolution of title on the present appellant's mortgagor from the said Appavu Asari. But after filing his written statement, the present plaintiff remained *ex parte* and there was a mortgage decree in the suit with the consent of those parties that had entered appearance.

The subject of the dispute in the present proceedings is in relation to item 3 in that mortgage suit and the decree therein provided that a moiety of this item 3 and item 1 should be sold for recovery of sum of Rs. 500 A moiety of item 3, it was stated in the decree, belonged to the fifth defendant therein, the second defendant in the present proceedings The remaining moiety of item 3 as belonging to the second defendant therein, that is, the plaintiff in the present proceedings, was to be sold for the recovery of a sum of Rs 400 with subsequent interest It transpires that the fifth defendant, the present second defendant, had settled his claim with the mortgagee-decree-holder and the mortgagee proceeded in execution against the remaining moiety In the present suit, the then second defendant as plaintiff besides challenging the validity of the decree, pleading fraud and collusion by his then Advocate with the mortgagee plaintiff and others, contended that the property he was in possession of and sought to be proceeded against was not the subject of the mortgage or the mortgage decree He pleaded that the third item in the mortgage suit O.S No. 634 of 1943, was totally different from the property he was in possession of and that it was wrongly sought to be proceeded against as the subject of the mortgage decree In the plaint he has set out two schedules of properties The 'A' schedule property is stated to be the property which he held as his own and which it is stated, was not subject to the mortgage The 'B' schedule property is the property as described in the mortgage suit and in the decree that followed A reference to the schedules would show that the 'A' schedule claimed by the plaintiff as not the subject of the mortgage and the 'B' schedule admittedly the subject of the mortgage bear the same survey number T S No 1156. The boundaries of both 'A' and 'B' schedules by reference to the survey numbers of the boundary fields are also the same. However, the descriptive boundaries of the properties differ and apparently differ rather widely. The 'A' schedule property, which the plaintiff claims as not bound by the mortgage, is stated to be in the northern row of Pudu Theru and the 'B' schedule property the subject of the mortgage decree is shown in the decree as in the southern row of Pudu Theru For the plaintiff, certain other dis-

crepancies and differences in the boundaries are relied upon. The trial Court rejected a contention of the plaintiff that the decree in the mortgage suit was nullity for the reason that it was passed in terms of a compromise to which the plaintiff was not a party. It must be appreciated that an *ex parte* decree in terms of prayer in the plaint could have been more onerous, as the decree could be for the full mortgage amount. The plea of fraud and collusion by his Counsel in the earlier suit was found against. As regards the identity of properties, it was *inter alia* pointed out that the present plaintiff had not raised any objection or protest as regards identity in the execution proceedings though he had taken other objections. The question whether the survey numbers or the descriptive boundaries which also to a certain extent, were vague, should prevail was found in favour of the decree-holder, and the learned District Munsif held that it was idle on the part of the plaintiff to contend that the property brought to sale and purchased under the mortgage decree was not T.S. No. 1156, but something different from it. The learned District Munsif further held that the objection raised by the plaintiff to the execution of the decree was one that would come under section 47, Civil Procedure Code, and that a suit was barred.

On appeal, the learned Subordinate Judge of Tiruchirapalli has reversed this decision and decreed the suit as prayed for. The only question that was taken up for determination in appeal and appeared to have been pressed before the appellate Court was that the 'A' schedule property was not the property comprised in the mortgage decree. The learned Subordinate Judge has taken the view that the descriptive boundaries should prevail over the survey numbers No doubt, in the earliest document of the plaintiff the survey number of his property was shown as 1178 However the learned Subordinate Judge would hold that T S. No. 1156 was plaintiff's property as identified by the description of its boundaries and that if the descriptive boundaries of the said property were considered, it did not tally with the corresponding descriptive boundaries of the property, the subject of the mortgage decree. He therefore held that the 'A' schedule property was different from the mortgaged property. The contention on behalf of the mortgagee-decreeholder that section 47, Civil Procedure Code, was a bar to the maintainability of the suit was overruled In the result, holding that the 'A' schedule property in the present plaint is not included in the suit O S. No. 634 of 1943, a decree was given in favour of the plaintiff declaring his title to the property and granting an injunction in his favour from the property being proceeded against in execution of the mortgage decree.

In the appeal before me by the first defendant in the suit, the decreeholder-auction purchaser, it is contended that the learned Subordinate Judge's view as to the error in the boundaries is unsustainable and that it is not an invariable rule of law that descriptive boundaries should prevail over survey numbers. Normally boundaries prevail over numbers but circumstances may demand that the survey number should prevail over the descriptive boundaries particularly when the descriptive boundaries are themselves vague and their identification difficult There can be no inflexible principle in this. The question for consideration always is which part of the description is wrong. Where lands are described by numbers and also by description of the boundaries, and a mortgagor or other granter owns lands sufficiently answering to one feature and not the other, the other will be rejected as a misdescription—*falsa demonstratio non nocet de corpore constat* There must be available an adequate and sufficient definition of what is intended to pass for the principle to apply, and it must fit with certainty to one subject. In my view it is now unnecessary to examine the correctness or otherwise of the finding of the learned Subordinate Judge on the question of the identity of the properties, as I am inclined to agree with the contention of learned Counsel that it is for the executing Court to examine the question as to the identity of the property that is the subject of the decree which it is executing. Learned Counsel for the appellant while not conceding, rightly points out that it may be a different matter if what had been pleaded and put forward in the present suit is a paramount title. The second defendant had been absent and *ex parte* at the trial, there was no decision on the paramount title

set up and it may be, that if he can sustain the paramount title, which he had pleaded in the present suit he may not be bound by the decree But I fail to see how the question actually raised in the suit is not one relating to the execution, discharge or satisfaction of the mortgage decree All questions arising between the parties to the suit, in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree have to be determined by the Court executing the decree and not by a separate suit. In the latest edition (13th Edition), of Mullah's Civil Procedure Code, at page 221, it is pointed out that if the decree-holder takes in execution land not included in the decree, or in excess of the decree, the judgment-debtor must apply under section 47 for the recovery of such land, and a separate suit for that purpose will not lie. In *Jainarain* v. *Kedarnath*[1] the law is thus stated :

" The only question that remains is whether the executing Court can consider whether the defendant is in a position to perform his part of the decree But of course, it can. If the executing Court cannot consider this question who can? The executing Court has to see that the defendant gives the plaintiff the very thing that the decree directs and not something else, so if there is any dispute about its identity or substance nobody but the Court executing the decree can determine it. It is a matter distinctly relating to the execution, discharge or satisfaction of the decree and so, under section 47, Civil Procedure Code, it can only be determined by the Court executing the decree."

A decision in a case more or less similar to the matter now before me is found in *Rajendra Prasad* v. *Jai Prakash Pandey*[2], There also the question was as to the identity of the property the subject of a mortgage decree. The later suit in that case was by the mortgagor . The mortgagee had earlier brought a suit on the mortgage for sale of the mortgaged properties. In the plaint in the mortgage suit the property in dispute was described in two schedules, schedule 1 describing the property with reference to old survey numbers and schedule 2 describing the property with reference to new survey numbers The suit ended in a compromise decree, and the dispute as to the identity of the property, the subject of the mortgage, in the execution proceedings was raised in the later suit. The mortgagors claimed in the later suit that a particular area of which possession had been taken in pursuance of the mortgage decree was not included in the mortgage bond and that the property was wrongly sold in execution and purchased According to the mortgagors, the mortgaged property was described correctly in schedule 1 and not in schedule 2, while according to the mortgagees and those claiming under them the mortgaged lands had been correctly described only in schedule 2. The compromise decree provided for the sale of the properties described in schedule 2 One of the questions that was mooted in that case was whether there was an estoppel by the consent decree. The learned single Judge who originally disposed of the case dismissed the suit on the ground of estoppel and by reason of the bar under section 47, Civil Procedure Code. On appeal under the Letters Patent, with reference to the bar under section 47, Civil Procedure Code, the learned Judges observed thus:

" In any event, we are satisfied that the suit has been rightly dismissed on the ground that it was barred under the proviso of section 47, Civil Procedure Code. That was the view taken by Das, J , and we consider that this is a correct view. This view is supported by a decision of a Division Bench of the Calcutta High Court in *Sarda Churn Coho* v. *Partiva Sundari Debi*[3], in which a sale proclamation and notice had been settled in a manner so as to include properties not included in the mortgage and the judgment-debtor with full knowledge allowed this property to be sold.

It was held that the judgment-debtor cannot subsequently object that the whole proceeding had been vitiated and, therefore, the sale ought to be set aside and that

1. (1956) S.C.J. 301 (1956) S.C R 62 (1956) 1 M L.J. (S C) 151 · (1956) 1 An. W.R. (S.C.) 151· A.I R. 1956 S.C. 359 at page 363.
2. A.I.R 1957 Pat. 700.
3. (1936) 40 C.W.N. 428.

section 47 operated as a bar. A similar view has been expressed by the Privy Council in *Ramachandra Naidu* v. *Kadiriyasami Naicker*[1], in which the purchaser in a sale under a mortgage decree had been given sale certificate which plainly included certain property and had been put in possession It was held by the Privy Council that in these circumstances it was not open to the Court in a subsequent suit by the mortgagor's representative to hold by reference back to the mortgage deed that the property in question was not sold under the decree.

It was further observed by the Privy Council that under section 47, Civil Procedure Code, the title of a purchaser can be questioned only by a petition in the execution proceedings and not by a separate suit and when a petition was barred by limitation the sale could not be questioned.........."

Mr. S. V. Jayaraman appearing *amicus curiae* drew my attention to *Bhagvati Saran* v. *Gargi Devi*[2], as the only case which could be considered as taking a different view. For one thing it is before the decision of the Supreme Court above cited and secondly the learned single Judge who decided the case appears to proceed on the view that the auction purchaser there was a third party and that it would be a case of dispute between the judgment-debtor and his own representative This being the legal position, I fail to see how an independent suit can be maintained The claim of the judgment-debtor in the present suit is that the decree cannot be satisfied by proceeding against the 'A' schedule property and that the 'A' schedule property is not the property which has been the subject of mortgage and the mortgage decree. It is the Court that granted the decree that should properly go into the question whether the decree can be satisfied by proceeding against the 'A' schedule property. In my view it is a matter relating to execution, discharge and satisfaction of the decree

No doubt it is open to the Court at any stage to convert a suit into an application subject to the question of limitation. It is a discretion vested with the Court whether the suit should be converted into an application. Learned Counsel appearing for the appellant submits that in the particular case, apart from this suit which has been brought up to this Court in Second Appeal concurrently execution proceedings have been going on between the parties and that the plaintiff in the suit had more than once been objecting to execution not on the ground as to the identity of the properties but on other grounds. For instance it is stated that on one occasion his only objection was that a specific western half was being brought to sale when what ought to be brought to sale was his undivided half share and that he succeeded in his objection in Letters Patent Appeal in this Court (L P A) It is to be regretted particularly in this context that the plaintiff has not chosen to enter appearance in this Court. Learned Counsel Mr S V. Jayaraman appearing *amicus curiae* has placed before me all relevant materials that are on record and having been taken through the record, I see no justification for converting the suit into an application at this stage Thanking learned Counsel *amicus curiae*, I am constrained to set aside the decree of the lower appellate Court and restore the decree of the trial Court and allow the Second Appeal. Parties will bear their respective costs throughout.

No leave.

V.K. ——— *Appeal allowed.*

1. (1921) I.L R. 44 Mad. 483 48 I.A. 155: A.I.R. 1922 P C. 252.
2. A.I.R. 1950 All. 186.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE M. M ISMAIL.

Perumal Naidu .. *Appellant**

v.

Krishnaswamy Naidu .. *Respondent*

Oaths Act (X of 1873), *section* 12—*Validity —If contravenes Article* 14 *of the Constitution of India—Parties to suit agreeing to abide by an oath—Challenger resiling from agreement without any reasons—Court allowing proposer to take oath and deciding suit on that basis—Legality*

No question of unconstitutionality arises with reference to section 12 of the Oaths Act as being opposed to Article 14 of the Constitution of India The position of a person who agreed to take an oath is essentially and basically different from the position of a person who agreed to abide by the taking of such an oath In the case of the former resiling from his agreement, from the very nature of the case, the Court cannot compel him to take the oath, if he was unwilling to take That is not the case with reference to a challenger Therefore even this basic difference in the position between the two parties is sufficient to justify the resiling of the two parties from their agreement being treated differently

Where the parties to a suit arrived at an understanding in the presence of the Court to abide by an oath and thereafter one of the parties, namely, the challenger goes back on the understanding without proper reasons, the Court can allow the other side, namely, the proposer to take the oath which he agreed to take and to decide the dispute on the basis of such oath being taken The principle of mutuality available in relation to specific performance of contracts cannot be applied to cases of such a nature

Appeal against the Decree of the District Court, Ramanathapuram, at Madurai, in Appeal Suit No 43 of 1967, preferred against the decree of the Court of the District Munsif of Srivilliputhur in Original Suit No 212 of 1965

R Alagar, for Appellant.

Respondent not represented

The Court delivered the following

JUDGMENT —The appellant and the respondent are brothers The respondent instituted a suit for redemption of an *othi* dated 1st November, 1941 executed by him in favour of the appellant over his undivided half share in the property and for partition and separate possession of his half share In the written statement filed by him, the appellant contended that the name of the respondent was included in the sale deed in respect of the suit property 'benami for name-sake' and that the *othi* executed by the respondent arising out of the benami purchase 'did not in any way affect the position' and hence the respondent was not entitled to any relief.

The learned District Munsif framed necessary issues and the suit was adjourned from time to time for trial and, when the suit came up for trial on 30th January, 1967, both parties filed a joint memo. stating that if the respondent took special oath putting out camphor and wearing an *arali* garland in front of Adisolari Pulukandi Koil stating that the respondent had a share in the suit property and had paid consideration, the suit might be decreed This memo. was signed by the respondent and the appellant and their Advocates. On this, the learned District Munsif appointed a commissioner to administer the oath and posted the case for return of the warrant to 4th February, 1967 On 3rd February, 1967 the respondent made an endorsement on the warrant that he was prepared to come for taking the oath.

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* S A. No 48 of 1968. 29th January, 1968.

But on that date the appellant made an endorsement on the warrant saying that for some reason he did not agree to the oath. Thereupon the commissioner returned the warrant on 4th February, 1967 On the return of the warrant the learned District Munsif posted the case to 6th February, 1967. On 6th February, 1967, he recorded what happened before the issue of the warrant and stated that since the appellant, the challenger, had resiled from his agreement without assigning any reason to satisfy the Court, the appellant was again given an opportunity to carry out his part of the agreement and light the camphor before the temple at 12 noon on 7th February, 1967 He further observed that the appellant again refused to fulfil his part of the agreement. Consequently the learned District Munsif directed the commissioner to administer the oath after lighting the camphor and giving an opportunity to the appellant to perform his part of the agreement. In pursuance of this direction, the commissioner executed the warrant and the respondent took the oath as per the joint memo. on 7th February, 1967 On 8th February, 1967 the learned District Munsif, after referring to the above facts, decreed the suit of the respondent

The appellant herein preferred A S No. 43 of 1967 on the file of the Court of the learned District Judge, Ramanathapuram at Madurai, and the learned District Judge on 23rd December, 1967 dismissed the said appeal. I must point out that the only contention urged before the learned District Judge was that the learned District Munsif erred in straightaway decreeing the suit without giving an opportunity to the appellant to explain the circumstances under which he resiled Along with the memorandum of appeal, an affidavit was also filed by the appellant stating that the members of his family were opposed to the decision of the suit on the basis of the oath and that was the reason for his resiling from the agreement. The learned District Judge, after considering the materials placed before him, came to the conclusion that the learned District Munsif had given every possible opportunity to the appellant and the reasons adduced in the affidavit filed before him were not sufficient to justify the appellant resiling from the agreement. Hence the present Second Appeal.

Mr. Alagar, learned Counsel for the appellant, contended that section 12 of the Indian Oaths Act, 1873 is unconstitutional as being opposed to Article 14 of the Constitution. That section states:

> "If the party or witness refuses to make the oath or solemn affirmation referred to in section 8, he shall not be compelled to make it, but the Court shall record, as part of the proceedings, the nature of the oath or affirmation proposed, the facts that he was asked whether he would make it, and that he refused it, together, with any reason which he may assign for his refusal."

Mr. Alagar himself conceded that section 12 does not deal with the case of a challenger but only with the case of the person who agreed to take an oath and that even if section 12 is held to be unconstitutional, that will not help the appellant. Apart from this I am of the view that no question of unconstitutionality arises with reference to section 12 The position of a person who agreed to take an oath is essentially and basically different from the position of a person who agreed to abide by the taking of such an oath. In the case of the former resiling from his agreement, from the very nature of the case, the Court cannot compel him to take the oath, if he was unwilling to take. That is not the case with reference to a challenger. Therefore even this basic difference in the position between the two parties is sufficient to justify the resiling of the two parties from their agreement being treated differently.

The next ground urged by Mr. Alagar is that if this position is allowed to prevail, it will merely result in there being a contract which cannot be mutually enforced. I do not think that the principle of mutuality available in relation to specific performance of contracts can be applied to cases of the nature in question. The essential thing is, here is an understanding arrived at between the two parties in

the presence of the Court, and when one of the parties, namely, the challenger goes back on the understanding without proper reasons, all that the Court does is to allow the other side, namely, the proposer to take the oath which he agreed to take and to decide the dispute on the basis of such oath being taken I do not think any question of mutuality arises under such circumstances. Therefore, in my view, there are no merits in the Second Appeal and the same is dismissed.

V K. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

PRESENT —MR. JUSTICE P. S. KAILASAM

Workmen of Dalmia Cement (Bharat) Ltd, represented by Cement Workers Union, Dalmiapuram, Tiruchirapalli District and others .. *Petitioners**

v.

State Government of Madras, represented by the Secretary, Department of Industries, Labour and Housing, Madras and others .. *Respondents.*

Industrial Disputes Act (XIV of 1947), *sections* 10 (1) *and* 12 (5)—*Scope—Government declining to refer industrial dispute for adjudication after consideration of conciliation report—If can by a subsequent order refer the same dispute for adjudication—Right of management to be heard*

Section 10 (1) of the Industrial Disputes Act confers unlimited powers on the Government to make a reference when it is of the opinion that an industrial dispute exists or is apprehended and this power can be exercised at any time. The fact that the Government had earlier refused to make a reference under section 12 (5) after considering the conciliation report, will not bar the Government's right to make a reference under section 10 (1).

Thus, whatever may be the position with regard to the power of the Government to revise an order refusing to make a reference, the Government has ample and unrestricted power to make a reference under section 10 (1) which may be exercised at any time, even after it had refused to make a reference at the first instance and the Courts will not be competent to question it, unless the order is made for extraneous reasons

State of Bihar v *D. N. Ganguly and others,* (1959) S C J. 533 : (1959) M.L J. (Crl.) 323 : (1959) S C R. 1191, distinguished

In such a case the order making a reference being administrative in character and as the rights of parties will be only decided subsequently, the management cannot complain that they have not been heard before the Government revised its views.

Where a dispute had originally been taken up by a Union and the Government refused to make a reference, the mere fact that the request for reconsideration of the Government decision was made by the aggrieved worker only, will not make the dispute any the less an industrial dispute as to make the subsequent reference invalid.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus*, directing the first respondent herein to refer the dispute which they have refused to refer under their G O. Rt No. 1079 dated 3rd June, 1966 to adjudication, etc.

B R Dolia of *Aiyar and Dolia, G R Venkataraman* and *A L. S Somayajula,* for Petitioner in W P. No 1721 of 1966.

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*W P. Nos 1721 of 1966 and 1929, 2900, 2901, 3817, 3436 and 3562 of 1967. 16th February, 1968.

The Government Pleader, for 1st Respondent

V. K Thiruvenkatachari for *King and Patridge* and *T N C Rangarajan*, for 2nd Respondent.

S Gopalaratnam, for Petitioner in W P. No 1929 of 1967

The Government Pleader, for 2nd Respondent

V. Venkataraman, for Respondents 1 and 4

M R Narayanaswamy, for Petitioner in W P Nos 2900 and 2901 of 1967

The Government Pleader, for 1st Respondent

K. V. Sankaran for *S Ramaswamy*, for 2nd Respondent

V K Thiruvenkatachari and *T N C Rangarajan*, for *King and Patridge*, for Petitioner in W P No 3817 of 1967

The Government Pleader, for 1st Respondent.

B. R Dolia of *Aiyar and Dolia*, *G Venkataraman* and *A L Somayajulu*, for 3rd Respondent.

V. K Thiruvenkatachari and *T N C Rangarajan* for *King and Patridge*, for Petitioner in W P No 3436 of 1967

The Government Pleader, for 1st Respondent

B R Dolia and *A L Somayajulu* of *Aiyar and Dolia*, for 3rd Respondent

V K Thiruvenkatachari and *T N. C Rangarajan*, for *King and Patridge*, for Petitioner in W P' No. 3562 of 1967.

The Government Pleader, for 1st Respondent

B. R Dolia of *Aiyar and Dolia*, *G. Venkataraman* and *A L Somayajulu*, for 3rd Respondent.

The Court made the following

ORDER —The question that arises in all these writ petitions is whether the Government having once declined to refer an industrial dispute for adjudication after consideration of a conciliation report, could, by a subsequent order, refer the same dispute for adjudication

Writ Petitions Nos 2900 of 1967 and 2901 of 1967 relate to a dispute between Best & Co (P) Ltd , and its workers M/s Best & Co was owning seven factories in Madras, and each of these factories had its own licence issued under the Factories Act, and workmen had been recruited for each factory separately One of the factories, namely, Bestonite Factory, had to stop production due to non-availability of sulphuric acid The factory was closed on 9th January, 1966 and thirty-four employees (29 workers and 5 in the staff section) were given notice and paid closure compensation Of the thirty-four persons, seventeen persons (12 workers and five staff) received the amount and settled the accounts The other seventeen put forward a claim through the Union that they should be absorbed and provided with employment in the other factories owned by the petitioner The company declined the request of the Union and conciliation proceedings were held by the Labour Officer, who by his report dated 25th May, 1966 intimated to the Government that no conciliation could be effected After considering the said report as well as the communication from the Commissioner of Labour dated 9th August, 1966, the Government acting under section 12 (5) of the Industrial Disputes Act passed an order dated 3rd September, 1966 declining to refer the dispute for adjudication The Government stated in the order that the Bestonite Factory was closed for *bona fide* reasons and that the other factories owned by the petitioner were separate entities and therefore, it was not possible to absorb the affected workers in any of them. The Union persisted in their claim and addressed a letter to the Deputy Secretary

The Industrial Disputes Act, 1947 was enacted to make provision for the investigation and settlement of industrial disputes. The Act provides for the constitution of Works Committee, Conciliation Officers, Boards of Conciliation, Courts of Inquiry, Labour Courts, Tribunals and National Tribunals for settlement of disputes. Section 10 provides for reference of disputes to Boards, Courts or Tribunals. Section 10 (1-A) enables the Government when it is of opinion that any industrial dispute exists or is apprehended, to refer, by an order in writing at any time, the dispute to the Board or to the Court of enquiry, or a Tribunal as the case may be. Chapter IV of the Act prescribes the procedure, powers and duties of the authorities. Section 12 enumerates the duties of Conciliation Officers. Section 12 (1) provides that where any industrial dispute exists or is apprehended, the conciliation officer may, or where the dispute relates to a public utility service and a notice under section 22 has been given shall, hold conciliation proceedings in the prescribed manner. Under section 12 (2) the Conciliation Officer is empowered to investigate the dispute and all matters affecting the merits and the right settlement thereof, and do all such things as he thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute. If a conciliation has been effected the Conciliation Officer is required to send a report to the appropriate Government with a memo. of settlement signed by the parties. If no such settlement is arrived at under sub-section (4) of section 12, the Conciliation Officer is required to send a full report setting forth the steps taken by him and the circumstances relating to the dispute and for bringing about a settlement thereof, together with a full statement of such facts and circumstances, and the reasons on account of which a settlement could not be arrived at. Sub-section (5) provides that if, on a consideration of the report referred to in sub-section (4), the appropriate Government is satisfied that there is a case for reference to a Board, Labour Court, Tribunal or National Tribunal, it may make such a reference and where the Government does not make such a reference, it shall record and communicate to the parties concerned its reasons therefor.

The scope of section 10 (1) and 12 (5) of the Act has been the subject-matter of several decisions of the Supreme Court. In *Madras State* v. *C. P. Sarathy*[1], the Supreme Court held thus:

"It must be remembered that in making a reference under section 10 (1), the Government is doing an administrative act and the fact that it has to form an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its function does no make it any the less administrative in character. The Court cannot, therefore, canvass the order of reference closely to see if there was any material before the Government to support its conclusion, as if it was a judicial or quasi-judicial determination. But if the dispute was an industrial dispute as defined in the Act, its factual existence and the expediency of making a reference in the circumstances of a particular case are matters entirely for the Government to decide upon, and it will not be competent for the Court to hold the reference bad and quash the proceedings for want of jurisdiction merely because there was, in its opinion, no material before the Government on which it could have come to an affirmative conclusion on those matters."

In *State of Bombay* v. *Krishnan*[2], the Supreme Court held that section 12 (5) occurs in a chapter dealing with the procedure, powers and duties of the authorities under the Act, and it would be legitimate to hold that section 12 (5) which undoubtedly confers power on the appropriate Government to act in the manner specified by it, the power to make reference which it will exercise if it comes to the conclusion that a case for reference has been made, must be found in section 10 (1), and it would not be reasonable to hold that section 12 (5) by itself and independently of section 10 (1) confers power on the appropriate Government to make a reference. The

1. (1953) S.C.J. 39: (1953) 1 M.L.J. 212: A.I.R. 1953 S.C. 53.
2. (1960) 2 L.L.J. 592.

Court further held that it could not be contended that the appropriate Government acting under section 12 (5) of the Act is bound to base its decision only on a consideration of the report made by the conciliation officer under section 12 (4) It would be open to the Government to consider other relevant facts which may come to its knowledge, and in the light of all the relevant facts, it has to come to its decision whether a reference should be made or not Regarding the functions of the Government, the Court held that the order passed by the Government may be an administrative order and may not be justiciable in the sense that their propriety, adequacy or satisfactory character may not be open to judicial scrutiny and that the Court hearing a petition for *mandamus* is not sitting in appeal over the decision of the Government; nevertheless if the Court is satisfied that the reasons given by the Government for refusing to make a reference are extraneous and not germane, then the Court can issue a writ It is open to the Government in considering the question of expediency to enquire whether the dispute raises a claim which is very stale or which is opposed to the provisions of the Act, or is inconsistent with any agreement between the parties and if the Government comes to the conclusion that the dispute suffers from infirmities of this character, it may refuse to make the reference In *Bombay Union of Journalists* v *State of Bombay*[1], the Court held that in considering an order made by the Government under section 10 (1) read with section 12 (5), the Court is not sitting in appeal over the order and is not entitled to consider the propriety or the satisfactory character of the reasons given by the Government. The decisions referred to above were considered by this Court in *Coimbatore District Textile Mills Staff Union* v *State of Madras*[2] The effect of these decisions is that the Government in passing an order under section 10 (1) read with section 12 (5) is acting in an administrative character, and has an option to make the reference or not depending on the facts of each case It is open to the Government in coming to a conclusion under section 12 (5) to take note of the relevant facts which may be brought to its notice and need not confine itself to the report of the Conciliation Officer. It will thus be seen that the power of the Court in interfering with an order passed under section 10 (1) read with section 12 (5) of the Act is very limited and is confined to interference in cases where the Government in passing an order of reference is guided by matters which are extraneous and not germane to the questions

The main contention on behalf of the petitioners is that the Government has no authority to cancel an order issued under section 10 (1) of the Act. It is contended that if the Legislature intended to confer on the appropriate Government a power to cancel an order made under section 10 (1), the Legislature would have made a specific provision in that behalf and would have prescribed appropriate limitation on the exercise of the said power. In support of this contention, a ruling of the Supreme Court in the *State of Bihar* v *D N. Ganguly and others*[3], was strongly relied on In that case, the Government after making a reference under section 10 (1) of the Industrial Disputes Act, cancelled the reference in respect of which an industrial dispute was pending adjudication before the Tribunal The Supreme Court held that the order cancelling the reference was illegal, and could not be sustained Repelling the contention that a power to cancel or supersede a reference must be held to be included under section 21 of the General Clauses Act, 1897, the Court held that the rule of construction embodied in section 21 can apply to the provisions of a statute only where the subject-matter, context and effect of such provisions are in no way inconsistent with such application The Court after referring to the various provisions of the Act observed that it is only when an order in writing is made by the Government referring an industrial dispute to the tribunal, proceedings commenced, but the scheme of the relevant provisions would *prima facie* seem to be inconsistent with any power in the appropriate Government to cancel the reference made under section 10 (1) After referring to the provisions of section 12 (5) which makes it incumbent on the Government to communicate its reasons if it

1. (1964) 1 L L J. 351.
2. (1967) 2 M L J. 508 . (1967) 2 L.L J 407
3. (1959) S C J. 533 (1959) 1 An.W R. (S C) 178 (1959) 1 M L J (S C) 178 : (1959) M.L J (Crl) 323 . (1959) S C R. 1181.

decides not to make a reference, the Court observed that if the appellant's argument that the Government could withdraw the reference, it would mean that even after the order is made by the appropriate Government under section 10 (1), the said Government can cancel the said order without giving any reasons It proceeded to observe that this position is clearly inconsistent with the policy underlying the provisions of section 12 (5) of the Act and that if the Legislature had intended to confer on the Government the power to cancel an order under section 10 (1), the Legislature would have made a specific provision in that behalf and would have prescribed appropriate limitations for the exercise of the said powers

The above quoted passage is relied on by the learned Counsel for the petitioner who submitted that the observations are equally applicable to an order by the Government making a reference as well as refusing to make a reference, for, the statement is in general terms and is not confined to that portion of section 12 (5) which relates to the Government making a reference On the other hand, on behalf of the Government and the respondents, it was strongly contended that the observations should be confined to the facts of that case in which the Government made a reference and the other provisions of the Act became operative, and not to a case where the Government had refused to make a reference While the observations were made with reference to a case in which the Government sought to withdraw a reference already made, the statement that if the Legislature had intended to confer on the appropriate Government the power to cancel an order, it would have made a specific provision, cannot be said to be inapplicable to that part of section 12 (5) where the Government had refused to make a reference, for, in that case also, there is no specific provision enabling the Government to pass an order directing a reference and where it had already decided not to make a reference and recorded and communicated the parties the reasons therefor The learned Government Pleader referred to a decision of this Court in *Radhakrishna Mills* v *State of Madras and others*[1], and *Sri Rama Vilas Service Ltd* v *State of Madras and another*[2], where Rajagopalan, J , held that an order under section 12 (5) made on a consideration of the conciliation report is purely administrative in character and that the Government could pass any number of orders To the extent, the decision rules that the Government can pass an order withdrawing a reference which had been made already, it is not in conformity with the decision of the Supreme Court in *State of Bihar* v *D N. Ganguly*[3]. Several High Courts have taken the view that the Government after refusing a reference can subsequently make a reference Vide the decisions in *Gurumurthi and another* v *Ramulu and others*[4], *L H Sugar Factories and Oil Mills Ltd* v. *State of U P*[5], *Panipet Woollen and General Mills Co , Ltd* v. *Industrial Tribunal*[6]; *L H. Sugar Factories and Oil Mills* v *State of U.P*[7]; *Vasudeva Rao* v *State of Mysore*[8]; *Rawalpindi Victory Transport Co* v *State of Punjab*[9], and *Shankar Flour Rice and Dhal Mills* v. *Labour Court*[10] These decisions have not considered the effect of the decision of the Supreme Court in *State of Bihar* v *D N Ganguly*[3] They expressed the same view as expressed by this Court in *Radhakrishna Mills* v *State of Madras and others*[1], and *Sri Rama Villas Service Ltd* v *State of Madras and another*[2] In *Shankar Flour, Rice and Dhal Mills* v *Labour Court*[10], in considering the question whether the State Government, when once it decided not ro refer the dispute, it could subsequently exercise the power, the Court observed that if a reference is made, it is evidence that a power had been exercised, but if no reference is made, it clearly showed that the power had not been exercised, and that only when a reference is made that the power conferred can be taken to have been exercised and the refusal to make a reference does not entail the exercise of any power With respect, I am unable to accept this reasoning, for, even in refusing to make a reference, the Government will have

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1 (1956) 1 M L J 280 A I R 1956 Mad 113
2 A I R 1956 Mad 115
3 (1959) S C J 533 (1959) M L J (Crl) 323 (1959) S C R 1191
4 (1957) 2 An W R 335 . (1958) 1 L L J 20 (A.P).
5. (1961) 1 L L J 686 (All)
6 (1962) 1 L L J 555 (Punj)
7 (1963) 1 L L J 340 (All)
8 (1963) 2 L L J 717 (Mys)
9 (1964) 1 L L J 644 (Punj)
10 (1966) 1 L L J 807 (All)

to exercise its power and give reasons for not making the reference The decision also does not refer to the decision of the Supreme Court in the *Ganguly's case* referred to above, on which strong reliance was placed by the learned Counsel for the petitioner.

The contention of the learned Counsel, that applying the reasoning of the Supreme Court that the absence of a specific legislative provision enabling the Government to cancel an order withdrawing a reference would apply to an order under section 12 (5) refusing to make a reference, cannot be said to be without basis.

Mr Dolia, learned Counsel for the petitioner in W P No 1721 of 1966 submitted that whatever may be the position with regard to the power of the Government to revise an order refusing to make a reference, the Government has ample and unrestricted powers under section 10 (1) of the Act which may be exercised at any time and the Court will not be competent to question it, unless the order is made for extraneous reasons Section 10 (1) confers unlimited powers on the Government. The power to make a reference can be availed of by the Government, if it is of opinion that any industrial dispute exists or is apprehended by making a reference in writing at any time This reference can be made either on a conciliation report under section 12 (4) or directly under section 10 (1). If it is made under section 12 (5), it acts on the conciliation report and other materials that may be available to it. But when it acts under section 10 (1), the Government may make a reference when it is of the opinion that an industrial dispute exists or is apprehended, and this reference can be made at any time The opinion of the Government is subjective and cannot be questioned by this Court. Whether an industrial dispute exists or is apprehended is a matter for the Government to determine The Government when making an order of reference is not under an obligation to give its reasons The fact that the Government has refused to refer under section 12 (5) will not bar the Government's right to make a reference under section 10 (1). The contention of Mr. Dolia is that the refusal of the Government to make an order of reference does not determine an industrial dispute An industrial dispute is only settled under section 12 (3) where the parties accept the conciliation, or under section 18 (1) when an award is passed As the industrial dispute continues, it may be that the Government on the same matter subsequently come to the conclusion that it is desirable to make a reference In this case, it is submitted that the Government has not only the power, but a duty to refer the matter for the purpose of keeping industrial peace The learned Counsel submitted that after the refusal of the Government to make a reference, there may be a strike and the appropriate Government may then decide to make a reference under section 10 (1), and then under section 10 (3) of the Act, prohibit the continuance of any strike or lock out in connection with such dispute which may be in existence on the date of the reference Learned Counsel referred to the wide powers under section 10 (1) and submitted that the powers are mainly conferred for the purpose of keeping industrial peace and no restriction should be placed on it On a reading of section 10 (1), I am satisfied that the power of the Government is unlimited and it can refer a dispute when it is of opinion that an industrial dispute exists or is apprehended The opinion of the Government is subjective and the question whether a dispute exists or is apprehended is also for the Government to decide Considering the various provisions of the Act, I am satisfied that this power is exercisable at any time, that is, even after the Government had refused to make a reference at the first instance. It is unnecessary to consider the question whether the Government having once refused to make a reference and recorded its reasons under section 12 (5), it could make a fresh reference The Government can always make a reference under section 10 (1) whatever action it might have taken under section 12 (5) earlier

On behalf of the petitioners an attempt was made to show that the Government did not invoke the aid of section 10 (1), but only purported to revise an order which it passed under section 12 (5) This argument may not help the petitioners, because the Government had some material subsequent to the passing of the order under sec-

tion 12 (5), and their power to make a reference under section 10(1) being unlimited, the reference cannot be said to be illegal

It was contended on behalf of the petitioners that the Government having once refused to make a reference if it subsequently revised its views and made a reference, it would prejudice the interests of the petitioners, and that the rights of the petitioners could not be adversely affected without hearing them It was submitted that if the Government revised its views and referred the matter to the Labour Court for adjudication, the management would be faced with payment of arrears of salary and other liabilities The question whether the management is liable to pay or not would depend upon the subsequent adjudication by the concerned authority So far as the Government is concerned, it does not decide the liability of the parties, but only refers the dispute for adjudication as it is enjoined to refer the matter when it is of opinion that an industrial dispute existed or is apprehended The order being administrative in character and as the rights of parties will be only decided subsequently, the petitioners cannot complain that they have not been heard before the Government revised its views and made a reference. The submission of Mr. Dolia on the powers of the Government under section 10 (1) of the Act will have to be accepted and the order of reference held valid In this view of the matter, it is unnecessary to consider the facts of the various cases The references in all these cases are held to be valid The writ petitions are accordingly dismissed There will be no order as to costs

V K. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE M M. ISMAIL.

Srimathi Kamalambal .. *Appellant**

v.

Srinivasa Odayar (died) and others . *Respondents.*

Hindu Succession Act (XXX of 1956), *section* 14 (1) (b)—*Reversioner consenting to an alienation by the limited heir and joining the execution of the deed of settlement—Section* 14 (1) *if attracted.*

Evidence Act (I of 1872), *section* 32 (5)—*Reliance on the statement of the deceased person relating to the existence of relationship by blood—Absence of independent evidence to that effect—Statement, if a relevant fact.*

A reversioner whether male or female who consents to an alienation (execution of settlement) by a widow or other limited heir made without legal necessity or to an invalid surrender and transferees from him, are precluded from disputing the validity of the alienation, though he may have received no consideration for his consent. It is immaterial that the alienation is by way of gift In this case *K* who had not yet become entitled to the property, has lost the right to file a suit and recover possession by joining in the execution of the deed of settlement Hence, section 14 of the Hindu Succession Act did not affect the settlement deed

All that section 32 (5) of the Evidence Act states is that when the statement of the deceased person relates to the existence of any relationship by blood, marriage or adoption , the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised, such statement would be a relevant fact Here, the plaintiff in his evidence had stated that his mother gave him the names in the pedigree and relationship for performing the ceremony. If it was proved independently of the evidence of the plaintiff that the mother of the plaintiff had made such a statement in respect of the relationship that the statement may come within the scope of section 32 (5) of the Evidence Act, but not the evidence of plaintiff as such Consequently, the plaintiff's evidence being purely hearsay cannot constitute legal evidence.

Appeal against the Decree of the Court of the Subordinate Judge, Kumbakonam, in Appeal Suit No 115 of 1961 preferred against the decree of the Court of the District Munsif of Valangiman at Kumbakonam in Original Suit No 367 of 1960

*S A No 75 of 1963 1st March, 1968.

S M Amzat Nainar, T Srinivasan and *M G Dastagir*, for Appellant

K S Desikan, K Raman, K S Naidu and *R Vijayan*, for Respondents

The Court delivered the following

JUDGMENT—One Kumaraswamy Odayar died in about 1930 unmarried survived by his mother Soundarathammal and his sister Kamalathammal On the death of Kumaraswamy Odayar, Soundarathammal succeeded to the property as his mother On 25th November, 1955 Soundarathammal and her daughter Kamalathammal jointly executed a settlement deed in respect of the suit property in favour of Kamalambal, the sister's daughter of Soundarathammal Soundarathammal herself died in 1957 and Kamalathammal died later The first respondent herein instituted O S No. 367 of 1960 on the file of the Court of the District Munsif of Valangiman at Kumbakonam for recovery of possession of the suit property with future profits Before the suit, Kamalambal had alienated the property to Rathanavelu Odayar and one Ratnaswamy Odayar was in possession of the property as lessee under Rathanavelu Odayar Therefore, in the suit he impleaded Kamalambal as the first defendant, Rathanavelu Odayar as the 2nd defendant and Ratnaswamy Odayar as the 3rd defendant. The case of the plaintiff was that his grandfather and Kumaraswamy's grandfather were brothers and therefore he was the nearest male reversioner after the death of Kamalathammal to the suit property According to the plaintiff, the common ancestor was one Pethaperumal Odayar and he had two sons, Arunachala Odayar and Muthuswami Odayar. Arunachala Odayar had four sons, Periasami, Uthandi, Sellaperumal and Ramaswami, who are no more The plaintiff claimed to be the son of Sellaperumal who died about 45 years ago Muthuswami Odayar, the borther of Arunachala Odayar, had a son Chinnavya Odayar whose wife was Soundarathammal Thus, according to the case of the plaintiff, Kumarasamy Odayar was the last male holder and he is the nearest reversioner to him The defendants put forward principally two contentions, that the plaintiff was not the nearest reversioner at all and secondly, in any event, by virtue of the provisions contained in section 14 (1) of the Hindu Succession Act, 1956, Kamalathammal became the absolute owner of the property and therefore the settlement effected by Kamalathammal and Soundarathammal in favour of Kamalambal was a valid one In support of the case of the plaintiff, in addition to examining himself as P W 1, he examined an old man aged 85, living in the next street, as P W 2 and one purohit as P W 3. The admitted case of the parties is that there was no documentary evidence to establish the case of the plaintiff that his grandfather and Kumaraswamy Odayar's grandfather were Arunachala Odayar and Muthuswami Odayar, the sons of Pethaperumal Odayar The plaintiff sought to establish his case only on the strength of his own evidence and the evidence of P Ws 2 and 3 The learned District Munsif, by his judgment and decree dated 7th August, 1961, dismissed the suit He accepted the contention of the defendants with regard to the effect of section 14 of the Hindu Succession Act and held that since Kamalathammal became the absolute owner of the property, there was no question of any reversioner subsequent to that stage With regard to the claim of the plaintiff that his grandfather and Kumaraswamy Odayar's grandfather were brothers, after discussing the evidence of P Ws 1, 2 and 3, he came to the conclusion that the case of the plaintiff was not established As against this judgment and decree, the plaintiff preferred A.S No 115 of 1961 on the file of the Court of the Subordinate Judge of Kumbakonam The learned Subordinate Judge by his judgment and decree dated 29th June, 1962, reversed the conclusion of the learned District Munsif and decreed the suit of the plaintiff He came to the conclusion that the plaintiff had established that he was the nearest reversioner He also came to the conclusion that section 14 (1) (*b*) of the Hindu Succession Act, 1956, did not have the effect of enlarging any absolute estate in favour of Kamalathammal It is against this judgment and decree the first defendant in the suit has preferred the present second appeal

The principal contention of Mr A Sundaram Iyer, the learned Counsel for the appellant, is that the finding of the learned Subordinate Judge that the plaintiff had

established his claim that he was the nearest reversioner to Kumaraswamy Odayar was based on inadmissible evidence and consequently that finding cannot stand. As I pointed out already, the evidence consisted of the oral evidence of P W 1, namely, the plaintiff himself and two other persons P Ws 2 and 3 Both the Courts proceeded on the basis that the plaintiff being aged only 45, could not have had any personal knowledge of the ancestors Therefore his evidence could not be accepted As far as P Ws 2 and 3 are concerned, the learned District Munsif pointed out the confusion and the contradiction in the evidence of P W 2 and the excessive interest and zeal evidenced by P W 3 and held that their evidence could not be accepted Naturally the evidence of P W 1 itself, being the evidence of interested person, could not have furnished the basis for a conclusion in his favour The learned Subordinate Judge also referred to the evidence of P W 2 and finally wound up by saying "So even on the basis of the evidence of P Ws 1 and 2, I am satisfied that the plaintiff has established the relationship he has shown in the pedigree appended to the plaint and has proved that he is the nearest reversioner entitled to the estate of the deceased Kumaraswami" The learned Subordinate Judge was of the view that the statement of the plaintiff that his mother gave the names in the pedigree and the relationship of the persons shown in the pedigree has to be accepted in evidence under section 32 (5) of the Evidence Act In my opinion, the learned Subordinate Judge fell into an error in this behalf All that section 32 (5) of the Evidence Act states is that when the statement of deceased person relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption, the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised, such statement would be a relevant fact Here, P W 1 in his evidence had stated that his mother Gnanambal gave him the names in the pedigree and relationship for performing the ceremony If it was proved independently of the evidence of P W 1 that the mother of the plaintiff had made such a statement in respect of the relationship, that statement may come within the scope of section 32 (5) of the Evidence Act, but not the evidence of P W 1 as such Consequently, P W 1's evidence being purely hearsay cannot constitute legal evidence As far as P W 2 is concerned, all that he says in the evidence is

"It used to be said that the father of Arunachala and Muthuswami is Pethaperumal"

This is the only piece of evidence in the deposition of P W 2 so as to connect Arunachala said to be the grandfather of the plaintiff, with Muthuswami, the grandfather of Kumaraswamy, as brothers The statement given in the passive voice without indicating who told the witness about the relationship and as to when it was said to him, will not be admissible in evidence This will constitute only a hearsay Therefore, the evidence of P W 1 and P W 2 in this behalf is not admissible If so, the conclusion of the learned Subordinate Judge based on the evidence of P Ws. 1 and 2, that the plaintiff had established his case that he is the nearest reversioner of Kumaraswamy Odayar, cannot be sustained

In view of this conclusion it follows that the suit of the plaintiff has to fail and it is really unnecessary to go into the next question whether by virtue of section 14 (1) of the Hindu Succession Act, 1956, Kamalathammal had acquired an absolute title to the property However, since the learned Counsel on both sides argued this point, I would like to record my conclusion in this behalf as well I have already mentioned the fact that in the settlement deed dated 25th November, 1955 Kamalathammal also joined Soundarathammal in execution It must be remembered that after the death of Soundarathammal, Kamalathammal would be the next heir to succeed to the property of Kumaraswamy Odayar as his sister Consequently, on the date when the settlement deed was executed, Kamalathammal had a right of expectation in respect of the property of Kumaraswamy What exactly is the legal effect of Kamalathammal's joining in the execution of the settlement deed in favour of Kamalambal is to be gathered from the principle of law contained in paragraph 191 of the Mulla's Hindu Law, Thirteenth Edn. That paragraph states .

"A reversioner, whether a male or female, who consents to an alienation by a widow or other limited heir made without legal necessity, or to an invalid surrender, and transferees from him, are precluded from disputing the validity of the alienation, though he may have received no consideration for his consent. It is immaterial that the alienation is by way of gift"

Therefore, in so far as Kamalathammal joined the execution of the settlement in favour of Kamalambal, she was precluded from disputing the validity of the alienation and putting forward the contention that the settlement would enure only for the life of Soundarathammal and on her death she would get the property I may point out here that the settlement deed was executed in 1955 before the Hindu Succession Act came into force. Therefore, on the date when the Hindu Succession Act came into force, Soundarathammal had already alienated the property and Kamalathammal who had not yet become entitled to the property had joined the alienation already effected. With the result, on that date she had neither possession nor title to the property All that she could be said to have had if she had not joined in the execution of that deed, was a right to file a suit and recover possession of the property on the death of Soundarathammal. The legal position is that she has lost that right by joining in the execution of the deed of settlement If that be the case, section 14 of the Hindu Succession Act did not have any effect on the settlement executed in favour of Kamalambal The legal position stated above is really based on a Full Bench decision of this Court in *Ramakottayya* v *Viraraghavayya*[1], Mr. K S Naidu, appearing for the 2nd defendant, the alienee, sought to contend that the proposition of law as laid down in Mulla's Hindu Law and in the decision in *Ramakotayya* v. *Viraraghavayya*[1] has no application where it is a female heir who joined the execution and not a male reversioner. Mr. Naidu however was not able to produce any direct authority in support of his contention But, in my opinion, this contention has no substance either on principle or on logic. If a male reversioner who would have acquired an absolute title to the property can be precluded from impugning the validity of an alienation because of his consent, the case must be *a fortiori* in relation to a female heir who would have had only a limited estate once the reversion opened Therefore, I am unable to accept the contention of the learned Counsel Under these circumstances the second appeal is allowed and the judgment and decree of the learned Subordinate Judge is set aside and the judgment of the learned District Munsif is restored. There will be no order as to costs in this appeal No leave

V.M K. —————— *Second Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Chief Justice.*

Bhagavathi Mudaliar .. *Petitioner**

v.

N. Subramaniam .. *Respondent.*

Contract Act (*IX of* 1872), *section* 74—*Agreement to convey properties—initial amount deposited by vendee with vendor—If mere advance or deposit for due performance of contract—Determination of—Criterion*

Civil Procedure Code (*V of* 1908), *section* 115—*Finding of fact—Interference in revision—Scope*

Where an amount is deposited by a vendee with the vendor at the time when they entered into a contract to convey certain properties, the question whether the amount paid represents an advance simplicter or has any tinge of the character of a deposit for due performance of the contract or earnest money, could be spelt out

1 (1929) 56 M L.J 755 I L.R 52 Mad. 556

* C. R. P. No. 2058 of 1965. 25th August, 1967.

from the circumstances of the case and the evidence available and the mere nomenclature or the absence of any forfeiture clause in the agreement may not be decisive.

Admittedly there is no legal presumption one way or the other. The issue is purely one of fact. But where there is a total lack of legal evidence, the finding cannot be supported that the amount is really earnest money or deposit for the due performance of the contract and not an advance

It is true that errors of fact cannot be canvassed in revision, and even errors of law cannot be so canvassed, unless such errors have affected the jurisdiction of the trial Court. But when there is total absence of legal evidence for a finding by the lower Court, it would amount to an exercise of jurisdiction illegally or with material irregularity, justifying interference under section 115 of the Civil Procedure Code

Petition under section 115 of Act V of 1908 praying High Court to revise, the decree of the District Court, Kanyakumari at Nagercoil dated 5th March, 1965 and passed in A S No 119 of 1964 (O S No 226 of 1963 on the file of the Court of the Additional District Munsif of Nagercoil)

K. N. Balasubramanyam and *M Srinivasan*, for Petitioner

S. Padmanabhan and *D Muthuramalingam Pillai*, for Respondent

The Court delivered the following '

JUDGMENT.—The only question which is involved in this revision proceeding is whether an amount of Rs. 500 which was paid at the initial stage of an agreement to convey properties between the parties, represents an advance simpliciter, or has any tinge of the character of a deposit for due performance of the contract, or earnest money. If the amount of Rs 500 is only an advance, the plaintiff (revision petitioner) was bound to succeed in his suit If it could be conceivably held that the amount of Rs 500 could be regarded notwithstanding the mere nomenclature in the document the absence of a forfeiture clause, or the absence of any other indication in the evidence, as a deposit for the due performance, or earnest money, then the plaintiff will have to fail The Courts below have non-suited the plaintiff, and he is the revision petitioner here

For an important reason, I am not now proceeding into the one question of fact decided by the Courts below, that time had to be construed as the essence of this contract on the facts, and further that it was the plaintiff, the intending vendee, who committed breach of the contract Had the matter been open for my determination, some probabilities could no doubt be stressed by learned Counsel for the petitioner, for an opposite view It is a fact that the vendor later sold the properties shortly after the expiry of the period fixed, for a sum of Rs 22,000 to a third party But for an important reason, I am not now proceeding into this aspect at all. Actually, learned Counsel for the respondent argues, on the strength of the dicta of the Supreme Court in *Pandurang* v *Maruti*[1], that it is not even open to me to interfere in revision with the dismissal of the suit of the plaintiff for recovery of the alleged advance of Rs 500 The argument is that errors of fact cannot be canvassed in revision under section 115, Civil Procedure Code, and even errors of law cannot be so canvassed, unless such errors have affected the jurisdiction of the trial Court In any event, these dicta will certainly inhibit me from any re-assessment of the evidence, on the question of who committed the breach and arrival of any different conclusion after such reassessment We must therefore take it as established, that time was the essence of the contract in this case, and that the plaintiff did commit breach of the contract

Even so, on the facts, it is very difficult to see how there is any legal evidence, on which the conclusion could be based that the amount of Rs 500 was a kind of deposit, or earnest money, or security for performance, and hence liable to be taken in forfeiture by the vendor. As far as written statement is concerned, it is signifi-

1. (1966) 1 S.C J 1 : (1966) 1 S C R 102 A I R 1966 S C 153

cently silent on this aspect Most of the written statement is concerned with the facts which would show that it was the plaintiff the intending purchaser, who committed the breach of the contract As far as the document itself is concerned, though a particular nomenclature or the lack of certain words may not be decisive, the document is very unhelpful as regards the hypothesis that the amount of Rs 500 could represent any earnest money, or security *Ex facie* this amount merely appears to be an advance in respect of the consideration But I am willing to assume, on the authorities placed before me, that mere nomenclature in the document, or the absence of any ferfeiture clause, may not be decisive and that the character of a deposit or earnest money could be spelt out from the circumstances and the evidence.

Even so, the very great difficulty in this case is the total absence of any circumstances or legal evidence, which would tend to show that the amount of Rs 500 was not a mere advance, but was some kind of security for due performance, or earnest money. I shall now refer briefly to the authorities cited by learned Counsel on both sides, in order to demonstrate that where there is a total lack of legal evidence, the finding cannot be supported that the amount is really earnest money or deposit for fulfilment, and not an advance. Admittedly, there is no legal presumption one way or other The issue is purely one of fact In *Chiranjit Singh* v *Har Swarup*[1], the Judicial Committee pointed out that earnest money becomes part of the purchase price or consideration when the transaction goes forward, but is liable to forfeiture when the transaction falls, through or by reason of the fault or failure of the vendee. The decision is not helpful in the present context for the simple reason that it relates to an amount paid which is earnest money, or which is a deposit for due performance. If that is assumed here, it would really be begging the question The real problem is how is this to be determined, when the document itself merely treates the amount as an advance, and has no forfeiture clause, and there are no other circumstances from which the inference that the amount is earnest money, could be presumed.

There is a decision of a single Judge of the Calcutta High Court in *Naresh Chandra* v *Ram Chandra*[2], relied on by learned Counsel for respondent This follows the idea expressed in the decision of the Judicial Committee that earnest money has the two characteristics which I have already referred to Such earnest money, in the absence of an express or implied contract to the contrary is liable to be forfeited by the vendor, when the contract goes off for default of the purchaser. Here again, the nature of the money initially paid is assumed, and is the foundation for the argument Needless to say, it is of very little help in the present context

A very helpful precedent for our discussion is *Chunnilal* v *Mohanlal*[3] Here the learned Judge (Krishnan, J) was concerned with the test to be applied with reference to the terms of section 74 of the Contract Act, and he pointed out that the nomenclature in the document may not be decisive But what should be ascertainable with reasonable precision, on the evidence, is the understanding at the time of the agreement, between the parties. that the specific amount paid was a guarantee for the performance of the contract, and therefore liable to be retained by the person to whom it is paid, on breach of contract by the other party. The learned Judge further observed that when the amount was paid at the time of the agreement itself this fact may be of some help to assume that the amount could possess the character of earnest money.

The decision of a single Judge of the Andhra Pradesh High Court in *Rabina Bibi* v *Satyavathi*[4], does not take the matter any further, and the decision is really based on the dicta in *Chairanjit Singh* v *Har Swarup*[1].

On the contrary, there are two decisions relied on by learned Counsel for the revision petitioner, which have some relevance to his claim that, on the facts of this case, the suit should have been decreed The first is *Rattamma* v. *Krishna Murthi*[5], where the Division Bench of Devadoss and Jackson, JJ , observed that,

1 50 M L J 629 A I R 1926 P C 1
2 A I R 1952 Cal 93
3 A I R 1964 M P 126
4 (1963) An W R 253 : A I R 1963 A P 304
5. 54 M L J 40 A.I R 1928 Mad 326.

advances made by a purchaser to a vendor in respect of a sale are recoverable, even if the transaction falls through owing to the fault of the purchaser. To resist such a claim, the vendor must prove a contract, express or implied, between the parties, that the money paid in advance was agreed to be treated as security for the fulfilment by the purchaser of the bargain In this case it is liable to be forfeited, for the fault of the purchaser Where the vendor does not allege or prove this, the amount is merely an advance, and it is recoverable as such

The decision of Govinda Menon and Ramaswami, JJ, in *Sundarama Iyer & Co v Murugesa Mudaliar*[1], approbates these dicta, stressing that the law in this respect in India was somewhat different from the law with regard to contracts before the English Courts

With these authorities in mind, when we look at the facts of the present case, we find that there is total absence of legal evidence which would justify any inference that the amount of Rs 500 was anything more than an advance As far as the document goes, there is not the slightest hint that it was anything more than an advance towards the sale amount, or that it was a deposit for fulfilment of the contract or earnest money, in any sense Even in the written statement, such a plea is not explicitly put forward There is nothing in the evidence to support it I can understand an inference of such an agreement, even as implied and not as an expressed contract, but there must be at least some legal evidence as a foundation for such a conclusion There is none.

The only question is whether, nevertheless, this Court ought not to interfere in revision, because of the dicta of the Supreme Court earlier referred to But, when there is total absence of legal evidence, I think it is indisputable that this comes within the scope of section 115, Civil Procedure Code, for it would amount to an exercise of jurisdiction, illegally or with material irregularity.

Accordingly, I allow the revision and direct that the suit of the plaintiff be decreed with costs in the trial Court Parties will otherwise bear their own costs

V.K ——— *Petition allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE K VEERASWAMI AND MR JUSTICE T RAMAPRASADA RAO.

Perumal Naicker *Appellant**

v.

T. Ramaswami Kone and another *Respondents*

Transfer of Property Act (IV of 1882), section 3—Chattel attached to the earth or building—When becomes immovable property—Petter engine mounted and fastened to cement base—If becomes a permanent fixture.

The question whether when a chattel is attached to the earth or a building, it is immovable property, is a mixed question of law and fact, and has to be decided in the light of particular facts in each case For a chattel to become part of immovable property and to be regarded as such property, it must become attached to the immovable property as permanently as a building or as a tree is attached to the earth If, in the nature of things, the property is a movable property and for its beneficial use or enjoyment, it is necessary to imbed it or fix it on earth, though permanently, that is when it is in use, it should not be regarded as immovable property for that reason

Even proceeding on the assumption that the Petter engine (the subject-matter of sale in the instant case) has been mounted on cement base and fastened to it by bolts and nuts, it is not possible to regard the Petter engine as immovable

1 (1957) 1 M L J 221

* L P. A No 97 of 1963 26th September, 1967

property merely because for the beneficial enjoyment of it during its use, it is fixed to the earth in that manner The engine cannot be used except by fixing it to the earth. Therefore, it cannot be said that the intention, as disclosed by the fixture, is to make it a permanent part of the earth and so it is immovable property The nature of the engine and the purpose of its fixture, both show that it cannot be regarded as immovable property No doubt, the evidence in this case is that the Petter engine stood affixed to the earth from 1952 But this is because during that period the engine was used for that purpose the fixture was necessary But on that account, the fixture cannot be viewed as a permanent one

Appeal under clause 15 of the Letters Patent against the Judgment and Decree of the Honourable Mr. Justice Venkatadri dated 23rd January, 1963 preferred against the decree in A S Nos. 96 and 109 of 1958 on the file of the Court of the Subordinate Judge, Dindigul (O S No 101 of 1957, Court of the District Munsif, Dindigul)

A Sundaram Iyer and *T R. Mani*, for Appellant

N Ramachandran, *N Sivamani*, *N Krishna Mitra* and *V. Narayanaswami*, for Respondent No 1

The Government Pleader for 2nd Respondent.

The Judgment of the Court was delivered by

Veeraswami, J —This appeal, under the Letters Patent, is from the judgment of Venkatadri, J , by which he reversed the decree of the appellate Court below him and decreed the suit The first respondent having defaulted in repayment of a loan obtained from the State, the second respondent, under the provisions of the Land Improvements Loan Act, the Petter engine and pump-set, which the first respondent had purchased out of the funds provided by the loan, were attached in recovery proceedings under the provisions of the Revenue Recovery Act, and brought to sale. The appellant was the purchaser He was impleaded as the second defendant in the suit, which was to set aside the sale on the ground, among others, that the engine being a permanent fixture to the land, it was an immovable property, and that in the recovery proceedings the procedure applicable to such property having not been applied, the sale itself was invalid The first two Courts below differed in their view as to the nature of the property, the first appellate Court being of opinion that it was not an immovable property Venkatadri, J , was not prepared to accept that view and stated:

> "When once a land owner borrows money from the State and purchases an oil engine and fixes it to his land, it must be deemed to be part of the immovable property as his intention is to make the machine a permanent fixture imbedded to the earth Since the object is for the beneficial enjoyment of the land, it is immaterial whether he subsequently removes the machinery from place to place in any part of the land Wherever it is fixed, it becomes immovable property."

The learned Judge, in the course of his judgment, referred to certain tests, both English and Indian, and summed up that two tests have been laid down to determine the question (1) the degree or mode of annexation, and (2) the object of annexation; but in applying these tests it does not appear that the factual basis has been kept in view The trial Court assumed that the engine and pump-set were fixed permanently to the earth from 1952 The first appellate Court, with reference to the notice preceding the attachment and sale in recovery proceedings and the conduct of the first respondent himself, was inclined to think that the engine and pump-set, when sold, were movable property Apparently, at that time, the engine had been detached from its base in a room on the land of the first respondent

The question whether when a chattel is attached to the earth or a building, it is immovable property, is a mixed question of law and fact, and has to be decided in the light of particular facts in each case. Obvious cases may not call for tests.

Where doubt arises, certain tests have been formulated in particular contexts, which, if literally applied, may not yield always a proper and correct result While general tests pointed out by judicial decisions, in the light of specific facts, may be borne in mind, eventually the decision on the question should depend upon how the Court, looking at the facts as a whole, feels on the matter

'Immovable property' is defined at least in three Indian enactments, the General Clauses Act, the Registration Act and the Transfer of Property Act. The first two are not of much assistance, for they merely say that 'immovable property' includes things attached to the earth, or permanently fastened to anything attached to earth They give no guidance as to what is meant by 'attached' or 'permanently fastened' The third enactment, by section 3, describes what is meant by 'attached to the earth,' to wit, (*a*) rooted in the earth, as in the case of trees and shrubs, (*b*) imbedded in the earth, as in the case of walls or buildings, or (*c*) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached Broadly speaking, the degree, manner, extent and strength of attachment of the chattel to the earth or building, are the main features to be regarded. All the three aspects, in the description, show that the attachment should be uch as to partake of the character of the attachment of the trees or shrubs rooted to the earth, or the walls or buildings imbedded in that sense, the further test is whether, such an attachment is for the permanent beneficial enjoyment of the immovable property to which it is attached Even here, although there may be an attachment to the earth, as contemplated by the first two aspects in the description of 'attached', still if the attachment is a necessary requisite and that is the manner by which the movable property is or can be enjoyed or worked, it may be open to question whether because of its fixture, though permanently, in the qualified sense, it can *ipso facto* or *ipso jure* be regarded as immovable property *Board of Revenue* v *Venkataswami*[1], illustrates this. In that case, which was under the Stamp Act, a lease of properties relating to a touring cinema (tent and machines), though collapsible and capable of being removed, but permanently fastened to the earth when in use, was held to be not chargeable to stamp duty under section 30 (*a*) (1) of Schedule 1-A of that Act, as in the nature of things such properties could not be immovable property The learned Chief Justice, who spoke for the Court, further observed that the poles of the tent and machinery were imbedded in the earth only temporarily and not permanently It may be seen that a touring cinema, which is located in a place, is not shifted from place to place but continues to function for fairly a long period Permanence of the fixture, in the context, is, therefore, of a relative character For a chattel to become part of immovable property and to be regarded as such property, we should think, it must become attached to the immovable property as permanently as a building or a tree is attached to the earth If, in the nature of things, the property is a movable property and for its beneficial use or enjoyment, it is necessary to imbed it or fix it on earth, though permanently, that is when it is in use, it should not be regarded as immovable property for that reason That, as we understand, is the ratio of *Board of Revenue* v *Venkataswami*[1], *Subramaniam Firm* v *Chidambaram*[2] resembles the principle of *Board of Revenue* v *Venkataswami*[1] Certain tenants installed an oil engine as part of a cinema in a certain leasehold land, with the object of utilising the machinery for their profit Wadsworth, J, held that a security bond pledging the oil engine could not be deemed to be a transaction relating to immovable property. The learned Judge approached the question in the following manner:

> "If a thing is imbedded in the earth or attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached, then it is part of the immovable property If the attachment is merely for the beneficial enjoyment of the chattel itself, then it remains a chattel, even though fixed for the time being so that it may be enjoyed "

We find ourselves in agreement with the second part of these observations, which is apposite to the instant case In the case before us, the attachment of the oil engine to the

1. (1955) 2 M L J 215 (F.B.). 2. A.I.R 1940 Mad. 527.

earth, though it is undoubtedly a fixture, is for the beneficial enjoyment of the engine itself and in order to use the engine, it has to be attached to the earth and the attachment lasts only so long as the engine is used When it is not used, it can be detached and shifted to some other place The attachment, in such a case, does not make the engine part of the land and as immovable property *Mohammed Ibrahim* v *N C F. Trading Co* ,[1] was decided by a Division Bench of this Court under the provisions of the Registration Act That was a case of machinery of a mill fixed to a cement platform and attached to iron pillars fixed in the ground It was held that the movable property so attached should be regarded as immovable property It seems to us that this case turned on the special facts and the nature of the fixture, including the intention derived from the physical features of the fixture, that the mill was to be a permanent attachment to the earth A Petter oil engine, as in this case, stands on a different footing and from the very nature of this type of machinery We do not think that any useful purpose would be served by a reference to English cases, because they have proceeded on the basis of fixtures to realties, under the English law Different considerations have been applied by English Courts in deciding whether given things amounted to fixtures, in the sense in which the term is understood in the law relating to real property Nevertheless, reference may be made to two of these English cases In *Leigh* v *Taylor*[2], the House of Lords held that valuable tapestries affixed by a tenant for life to the walls of a house for the purpose of ornament and the better enjoyment of them, were not fixtures and therefore did not pass with the free hold to the remainderman The House of Lords thought that the tapestries formed part of the personal estate of the tenant for life The speech of Lord Halsbury shows that questions like this cannot always be answered, in the nature of things, with arithmetical accuracy, but certain discernible tests, as aids in deciding the question, are well-established, as, for instance, if something is made part of the house, it must necessarily go to the heir, because the house goes to the heir and it is part of the house So, where something is attached in some form to the walls of a house, nevertheless, having regard to the nature of the thing itself, and the purpose of its being placed there, it is not intended to form part of the realty, but is only a mode of enjoyment of the thing while the person is temporarily there, and is there for the purpose of his or her enjoyment. Though these observations were in the context of fixtures, and we are conscious that English law relating to fixtures cannot be bodily applied to conditions in this country, the observations of Lord Halsbury certainly are of weight and point to the correct approach to question of this kind The House of Lords, again had to consider in *Reynolds* v *Ashby & Son*[3], whether machinery attached to free-hold was a fixture There the machines affixed to concrete beds in the floor of the factory by bolts and nuts, could have been removed without injury to the building or the beds. In this case too Lord Halsbury was one of the Law Lords who decided it, but with this difference, here the House considered that as the machines were part of a factory, which was the subject-matter of a lease, the atachment of the machines to the earth in that manner should be regarded as a fixture.

The Petter engine, which has been the subject-matter of sale in the instant case, may be assumed to have been mounted on cement base and fastened to it by bolts and nuts Actually, there is no evidence in this case to that effect. It is surprising that when the main question which the Courts below had to decide was whether the chattel should be regarded as immovable property, no effort was made to put on record the nature of the attachment or fixture But proceeding on the assumption we made just now, we are of opinion that by the very nature of things, it is not possible, to our minds, to regard the Petter engine as immovable property merely because for the beneficial enjoyment of it during its use, it is fixed to the earth in that manner The engine cannot be used except by fixing it to the earth Therefore, it cannot be said that the intention, as disclosed by the fixture, is to make it a permanent part of the earth and so it is immovable property The nature of the engine and the purpose of its fixtures, both show that it cannot be regarded as immovable property No doubt,

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1 I L.R (1945) Mad 304 (1944) 2 M.L.J 60: A.I.R. 1944 Mad 492

2 L R (1920) A C 157

3. L R (1904) A.C 466

the evidence in this case is that the Petter engine stood affixed to the earth from 1952. But this is because during that period the engine was used for that purpose the fixture was necessary On that account, the fixture cannot be viewed as a permanent one.

On the view we have taken, namely, that the engine and the pump-set remained to be movable property, there was nothing wrong in the procedure applied to the attachment and sale, thereof This being the only point before us, the appeal is allowed the result of which is that the suit will stand dismissed. Each party will bear its own costs throughout

V.M.K. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR M. ANANTANARAYANAN, *Chief Justice* AND MR. JUSTICE M. NATESAN.

The Trustees of the Port of Madras, represented by the Chairman, Madras Port Trust .. *Appellant**

v.

The Home Insurance Co Ltd , Madras .. *Respondent*

Madras Port Trust Act (II of 1905), sections 39 and 40 and Contract Act (IX of 1872), sections 151, 152 and 161—Board taking charge of goods—Responsibility for loss etc., is that of bailee—Loss or damage established—Burden of proof on bailee to disprove negligence

Madras Port Trust Act (II of 1905), sections 110 and 111 and Limitation Act (IX of 1908), section 120—Intendment, scope, interpretation and applicability of—' Person ' in section 110, whether includes the Board—Protection under, when can be availed of by Board—" Anything done or purporting to have been done in pursuance of this Act," meaning of—Suit by insurer subrogee against Board—Limitation—Starting point

Transfer of Property Act (IV of 1882), sections 130-A and 135-A and Marine Insurance Act (XI of 1963), section 79—Doctrine of subrogation—Principles of—Scope and limitation of.

Evidence Act (I of 1872)—Burden of proof—See Madras Port Trust Act (II of 1905), sections 39 and 40.

Words and Phrases—' Person,' ' anything done or purporting to have been done in pursuance of this Act '—Meaning of—See Madras Port Trust Act (II of 1905), section 110

Per *Anantanarayanan, C J*—Though the contents of the claim or action by the subrogee is identical with, and cannot be different from the rights of the assured, to whom the insurer is subrogated, nevertheless the insurer can claim to be subrogated only proportionately to the extent to which he has compensated the assured for loss or damage to the goods

The true intendment of section 110 is a protection afforded to the statutory authority like the Port Trust, even at the risk of some inconvenience or difficulty to a party situated like the insurer subrogee Since all the parties are presumed to know the law, the intention is that insurers, who are parties to a policy of Marine insurance, which is a contract of indemnity, should be careful to see that, if they desire to sue the Board, as standing in the shoes of the assured, they are able to demonstrate a total right to do so, including payment, in whole or in part, to the assured, within a period of six months from the date of injury or loss, and to file a suit within that period In this interpretation the words " from the accrual of the cause of such suit or other proceeding" occurring in section 110 must be related to the earlier words defining the suit referred to, as claim against

* O. S. A. Nos. 28 and 37 of 1961. 20th September, 1967.

the Board or person "for anything done or purporting to have been done in pursuance of this Act" The cause of such suit is, necessarily, the occasion of loss or damage, whether it is the party originally damnified who is suing or an insurer who has compensated him and who sues as subrogee It equally follows that this provision is designed to secure for the Port Trust a protection from any such claim under any other provision concerning limitation, such as Article 120 of the Limitation Act

Per *Natesan, J*—There can be no dispute that the Board took charge of the goods under section 39 of the Madras Port Trust Act and the responsibility of the Board is that of a bailee under sections 151, 152 and 161 of the Indian Contract Act The Board as a bailee is bound to take as much care of the goods bailed to it, as a man of ordinary prudence under similar circumstances takes care of his own goods. It is a settled principle of law that in a case governed by the provisions of sections 151 and 152 of the Contract Act the loss or damage of the goods entrusted to a bailee is *prima facie* evidence of his negligence The burden of proof is therefore on the bailee to disprove negligence when damage or loss is established

(*Held* on facts that the Board did not take care of the goods in the manner expected of a bailee)

The word 'person' in section 110 is of sufficient amplitude to include the statutory body, the Board created under the Madras Port Trust Act Sections 110 and 111 go together A breach of statutory duty as well as an omission to perform a statutory duty would both fall under the protection given by the provisions of section 110 The services which the Board has to perform and could perform statutorily under the statutory powers and duties cannot be dissociated from its omissions and failures in relation to the goods Any action which is called for will properly be covered by the words "anything done or purporting to be done in pursuance of this Act" Nor can protection under section 110 be taken away on the ground that the Board is free to undertake or not the services and the performance of the services on the requirement of the owner cannot be construed to be anything done or purported to be done in pursuance of the Act The language of section 110 is of sufficient amplitude to cover even the class of functions for which no duty is cast by section 39 (1) but only power is given to undertake them Its language is wider in its scope and quite plain and emphatic The protection of the section would be available in respect of anything done or 'purported to have been done' in pursuance of the Act, and, therefore, once the Board assumes functions under the Act whether optional or obligatory, it can call in aid the protection afforded by section 110. The action being in respect of a matter covered by section 110, the protection of that section is not taken away by reason of the fact that the suit is not by the owner or consignee of the goods but by the insurer. The liability of the Board for damages is its neglect of duties as a bailee and the insurer's claim in substance is to enforce that liability The substantial cause for the suit is the same whoever figures as the plaintiff—whether it be the consignee or the insurer.

Section 110 provides for two things as a pre-condition to suits contemplated thereunder: (1) one month's previous notice in writing of the intended suit and of the cause thereof, and (2) the suit shall not be commenced after six months from the accrual of the cause of such suit, *i e*, the suit for anything done or purported to have been done in pursuance of the Act. It is the cause of that suit that has to be set out in the notice and it is from accrual of that cause the period of six months starts running There is no ambiguity in the section The language is clear and it is modelled on the lines of similar provisions protecting public authorities from delayed actions A shorter period of limitation in respect of actions against them is provided.

The claims against the Board in actions falling under section 110 of the Madras Port Trust Act, whoever, figures as the plaintiff—whether it be the assured or

the insurer—must be within six months from the accrual of the cause for the claim by the assured against the Board There can be no fresh start under section 110, on the insurer getting subrogated to the rights of the assured

A doctrine of subrogation comes in where one person has a claim against another and a third person is in certain circumstances allowed to have the benefit of the claim and the remedy for enforcing it, although it has not been assigned to him

Contracts of insurance are considered really as contracts of indemnity and the principle of subrogation is applied to it being an equitable arrangement incidental to all contracts of indemnity and to payments on account of the indemnity Subrogation is an equity rule and the equity of subrogation arises as the assured has concurrent remedies for relief from the loss against the person responsible for the loss and also against the insurer on the contract of insurance, each independent of the other And equity will not permit the injured to be doubly compensated by the insurer and the person liable for the loss On payment to the assured by the insurer in terms of his policy the doctrine of subrogation steps in and vests in the insurer the rights the assured has against the person who caused the loss. He succeeds to all the ways and means by which the assured may have reimbursed himself for the loss from the person responsible for the loss

The insurer's rights are not higher than that of the assured and he has no independent cause of action against the wrong-doer In fact the claims under the assured standing in his shoes and asserting his rights Only, on payment, *pro tanto*, without more, he gets substituted for the assured in relation to the person who is responsible for the loss and is answerable for the loss And this substitution occurs without reference or leave of either that person or the assured Before the insurer can recover under the doctrine of subrogation, he will have to establish the cause of action and liability of the wrong-doer for damages He must establish that it is the negligent act of the party proceeded against that was the proximate cause of the damage to the property of the assured

Appeals under clause 15 of the Letters Patent against the judgment and decree, dated 1st April, 1960 of the Honourable Mr Justice Ganapathia Pillai and passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court and made in C.S. Nos 5 of 1957 and 6 of 1957 respectively

V. V. Raghavan and *N. Nagarajan*, for Appellant.

V. Thyagarajan for *King & Patridge*, for Respondent.

The Court delivered the following Judgments

Anantanarayanan, C J—I have had the advantage of reading the judgment just delivered by my learned brother I entirely agree with him, not merely on the conclusion that the appeals ought to be allowed, but also on the grounds upon which that conclusion has to be based

It may, hence, appear somewhat superfluous that I should write a separate judgment, however condensed But I am impelled to do so, for an important reason. It is possible to present the central argument that Mr V Thyagarajan has sought to put forward, in these appeals, as the horns of a dilemma Presented in that form, the argument has the merit of great plausibility, at least on the first scrutiny. It is for this reason that I propose to tersely examine the links, in the logical chain of this argument, and to demonstrate that our conclusion follows as the correct one, even conceding the plausibility.

The process of reasoning is best expressed, I think, in the following form Is there a suit known to law by an insurer, as in this case, who has, partially or wholly, reimbursed the assured on a contract of indemnity, or Marine Insurance, in respect of loss or injury to the goods, and who seeks to recover from the wrong-doer, to a proportionate extent, as one who is subrogated to the rights of the party originally damnified ? Certainly, such a suit is known to law, and is a well-known instance of the application of the equity doctrine of subrogation to Marine Insurance. It was

originally expressed in sections 130-A and 135-A of the Transfer of Property Act, and this concept is now embodied in section 79 of the Marine Insurance Act, 1963, which repeals those sections of the Transfer of Property Act We must here emphasise that, though the content of the claim or action by the subrogee is identical with, and cannot be different from, the rights of the assured, to whom the insurer is subrogated, nevertheless, the insurer can claim to be subrogated, only proportionately to the extent to which he has compensated the assured for loss or damage to the goods. These principles are not in controversy.

Next, to follow the argument of Mr Thyagarajan a little further, what would comprise the bundle of rights known as the cause of suit, or 'cause of action' for the subrogee to recover from the wrong-doer damages to the proportionate extent? It is here that the classical definition of Lord Esher becomes significant, that the cause of action is 'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court.' Mr. Thyagarajan argues, is it not necessary for the insurer-plaintiff to prove in an action of that kind, that he paid compensation to the assured to the extent to which he claims relief against the wrong-doer, standing in the shoes of the assured, as he does, upon the equity principle of subrogation? The answer is certainly in the affirmative. Mr. V V. Raghavan for the Board of the Port Trust of Madras does not dispute, for example, that if a suit were brought forward by the insurer against the Board, without this vital link being averred and proved, that would be a fatal bar to the suit. Here Mr. Thyagarajan rightly contends that the depth of the implications of this issue was not measured in *Madras Port Trust* v. *A M Safiulla & Co.*[1], when Jagadisan, J., observed in that judgment·

> "The fact that the subrogee gets a complete cause of action only after payment to his assignor cannot give an extended period of limitation to the subrogee by computing the period of six months from the date of subrogation The recognition of a fresh starting point of limitation in favour of the subrogee from the date of subrogation may lead to the anomaly of reviving barred claims"

The learned Judge was careful to qualify these opinions, by observing that he was not finally deciding the matter; it was left open and the observations have to be construed as *obiter.*

The real point of Mr Thyagarajan is this; and that inevitably confronts the opposer with the seeming horns of a dilemma A suit of this character is known to law, and, indeed, it has been explicitly recognised But such a suit does not lie, until the cause of action for the insurer to sue the third party wrong-doer is perfected or made complete, by payment to the assured by the insurer That may take place on the last date of the period of six months, from the date when the loss or damage accrued. If that is the date of limitation reckoned from "the accrual of the cause of such suit or other proceeding," occurring in section 110 of the Madras Port Trust Act (II of 1905), then it would logically follow that such a suit could not be instituted at all by the insurer; he would be wholly deprived of his equitable remedy as a subrogee. Hence, this construction of section 110 is itself anomalous, and ought not to be adopted The other horn of the dilemma is that if, on the contrary, we hold that the insurer also is bound to bring the suit within six months from the date of occasion of loss or damage, it would be far more reasonable to suppose that section 110 applied only to suits by the person originally damnified, and did not at all include suits by the insurer-subrogee within its scope Article 120 of the Indian Limitation Act, 1908, the residual article, would apply, and these suits would be perfectly within time.

But, on deeper scrutiny, I think that it could be shown that this dilemma does not really exist, and that the view that we have adopted, which is briefly stated, in the *obiter* observations of Jagadisan, J., in *Madras Port Trust* v. *A. M. Safiulla & Co.*[1],

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1. (1962) 2 M.L.J. 29 at 32.

is the correct one. The real answer must be firstly, that such a suit is certainly known to law, but, secondly, that such a suit must nevertheless be filed within the special period of limitation prescribed for all such suits under section 110 of the Madras Port Trust Act One ground of justification for this view, has been referred to by my learned brother. The content of the rights of the subrogee cannot differ substantially from the rights of the assured, who was originally damnified by the negligence of the Port Trust authorities. The simple reason is that the insurer steps into the shoes of the assured, by virtue of the doctrine of subrogation as applied to Marine Insurance. He may be subrogated proportinately or wholly, but his right is derivative, and identical with the right of the assured, to recover against the Port for loss or damage If the Port Trust is not liable to the assured, upon an application of any principle or, on the facts, *ipso facto* it is not liable to the insurer-subrogee. It is for this reason that, if the Port Trust can rely upon section 110 for a plea of limitation, with regard to any action by the assured, who originally sustained the loss, brought more than six months from the date of the damage or injury, it can equally plead that an action by the subrogee not brought within the same period of limitation, would be barred. It cannot be that the Port Trust is entitled to have the suit by the party that originally sustained the loss, if brought, dismissed upon a ground of law (here, limitation), but that the same argument is not available as against the insurer-subrogee.

But it might be conceivably argued, and Mr. Thyagaraja does press this, that on the ground of the very process of reasoning exhibited above, we should hold that section 110 does not apply to the suit by the insurer-subrogee; it is the residual Article 120 of the Limitation Act that would apply Here, I think, the answer is to be sought in the intendment behind section 110, as a legislative provision designed to secure public authorities, like the Madras Port Trust, from being confronted with claims so belated that it would be unduly onerous for the public authority to defend itself against such claims. My learned brother has attempted to show how the other argument, based on sections 39 (1) (*a*) to (*d*), 39 (2) and 41-A of the Madras Port Trust Act, cannot be considered as valid, when it is sought to be pressed to justify the conclusion that section 110 will not apply to facts of this kind, because the duties were voluntarily assumed by the Board, or because the language of section 110 would not include omissions in respect of acts, as contrasted with positive performance. I find myself in entire agreement with his conclusions on that aspect.

But, this apart, the true intendment of section 110 is a protection afforded to the statutory authority, like the Port Trust, even at the risk of some inconvenience or difficulty to a party situated like the insurer-subrogee This can be illustrated acutely by pointing out the consequence of an opposite view. An accident causing loss or damage may occur, and the settlement of claims as between the assured and the insurer may be protracted; if the insurer-subrogee is to have the period of limitation reckoned only from the date of payment, conceived as an essential part of his 'cause of action', it may be impossible for the Board to defend itself, owing to the obliteration of evidence or knowledge of the facts The provision is a statutory safeguard, designed in the interests of public bodies like the Port Trust, performing these difficult duties, and undertaking heavy responsibilities as bailees and warehouse-providers. Since all the parties are presumed to know the law, the intention is that insurers, who are parties to a policy of Marine Insurance, which is a contract of indemnity, should be careful to see that, if they desire to sue the Board, as standing in the shoes of the assured, they are able to demonstrate a total right to do so, including payment, in whole or in part, to the assured, within a period of six months from the date of injury or loss, and to file a suit within that period. In this interpretation, the words "from the accrual of the cause of such suit or other proceeding" occurring in section 110, must be related to the earlier words defining the suit referred to, as a claim against the Board or person "for anything done, or purporting to have been done, in pursuance of this Act" The cause of such suit is, necessarily, the occasion of loss or damage, whether it is the party originally dammfied who is suing, or an insurer who has compensated him and who sues as subrogee. It equally

follows that this provision is designed to secure for the Port Trust a protection from any such claim under any other provision concerning limitation such as Article 120 of the Limitation Act

For these reasons, I agree in the judgment and conclusions of my learned Brother.

Natesan, J—These appeals from the decision of Ganapathia Pillai, J, in the Original Civil Jurisdiction of this Court which raise common questions of fact and law, are between the same parties and were heard along with another suit, C S. No 4 of 1957, also between the very same parties That suit was dismissed as barred by limitation and the suits now under appeal having been decreed, the defendants, the Trustees of the Port Trust of Madras (hereinafter referred to as the Board) have preferred these appeals The Home Insurance Company Ltd, a company incorporated in the United States of America, was the plaintiff in the three suits and is the respondent in the appeals before us. We may first set out certain material facts.

Messrs Fimberg and Trading Company, Dallas, Texas, in the United States of America consigned to Messrs. Baijnath Ganghadar and Company Ltd, Bombay, (hereinafter referred to as the assured) 750 bundles of high density American cotton in three consignments, by the steamer "s. s. Queen City", which arrived in Bombay on 31st January, 1952. In due course the goods were transhipped to "s s. Jalapankshi" for carriage to Madras and the goods arrived at the Madras Port on 27th April, 1952 The three consignments of cotton had been insured with the respondent (hereinafter referred to as the insurer) under three policies of insurance, one a consignment of 500 bales, another a consignment of 200 bales, and the third consignment being 50 bales. The landing of the cotton at the Madras Port commenced on 29th April, 1952, and it was completed on 4th May, 1952 Applications for the clearance and survey of the goods on behalf of the assured were filed in the office of the Board on 12th May, 1952 On the 18th of May, 1952, and on the following three days there was heavy rain in Madras as a result of which the goods got drenched and were considerably damaged. Thereupon the assured made claims on the insurer in a sum of Rs 41,537-4-0 in respect of the consignment of 500 bales, subject-matter of C S No 4 of 1957, Rs 13,215-14-0 in respect of the 250 bales in C S No 5 of 1957 (the subject of appeal in O S A No 28 of 1961) and Rs 3,339-1-0 in respect of the 50 bales in C S No. 6 of 1957 (the subject of appeal in O S A No. 37 of 1961) The insurer, after satisfying himself that the claims were valid, paid the assured their claims and filed the aforesaid three suits against the Board on the basis that the insurer had become subrogated to the rights of the assured

It was contended for the insurer, that the Board, after duly receiving the goods into its custody on landing, was in the position of bailee of the goods and had been grossly negligent in not properly storing the bales and protecting them from the weather as any prudent owner of the goods would have done in the circumstances. The insurer had paid the assured in respect of the claim relating to C.S No 4 of 1957 on the 18th of September, 1952, the claim in respect of C S No 5 of 1957, on 7th November, 1952, and the claim in C.S No 6 of 1957, on 31st October, 1952 The suit C S. No 6 of 1957 was filed on 29th April, 1953 and C S Nos 4 and 5 of 1957 were filed on 4th July, 1953, the Court being closed between 4th May, 1953 and 3rd July, 1953 The defence by the Board to the action was two-fold (1) On the merits it was contended that there was no negligence on the part of the Board in taking care of the goods; that the general practice was to stack compressed American cotton in the open, that that practice was followed in the present case, that it was only during the rainy season that the bales used to be covered by tarpaulin, and that the rain on 18th May, 1952, was unusual and non-seasonal Certain difficulties in the matter of storage of the goods were pleaded Consignees were charged with delay in clearing their consignments when there was too much congestion in the Port due to heavy arrivals of bales of American cotton. (2) It was contended that

the claims were barred by limitation This defence was rested on section 110 of the Madras Port Trust Act, 1906 (hereinafter referred to as the Act) which provides a special period of six months for action against any person for anything done or purported to have been done in pursuance of the Act from the accrual of the cause of the suit

On the question of negligence, the learned Judge, after a close analysis of the evidence and having regard to the law governing the matter, held that the Board did not take care of the goods in the manner expected of a bailee, and that it continued to be negligent even after the 18th of May when rain had fallen. He has taken the view that the Board cannot be held to have discharged the burden of proof that was laid on it to show that it had taken all the care incumbent upon a bailee. On the question of limitation it was contended for the insurer that if section 110 of the Act were to apply, anything done or purported to have been done must be under a statutory duty, and that in the present case it was only a voluntary assumption of an obligation which no doubt the Act permitted. It was pointed out that it was only a case of breach of contract by a public authority which had authority to enter into a contract but not under a duty to do so. It was said that under the provisions of the Act no statutory duty was cast upon the Board in respect of the goods imported into the Port either for accepting the goods as a bailee or storing them as warehouseman The further plea was that section 110 of the Act spoke only of an action against any 'person' and the Board was not a 'person' as contemplated in the Act. There was a further ground urged against accepting the applicability of section 110 to the present case. It was submitted that section 110 contemplated only action in respect of things done or purported to be done and not in respect of omissions It was said that the negligence of duty by a bailee could not be construed to be anything done or purported to have been done in pursuance of the Act. On these contentions it was urged for the insurer that the Board could not avail itself of the protection of section 110 of the Act It was further argued that as the insurer's claim was as subrogee the cause of action for the suits arose only on payment and the suits within six months of the payment would be within time even if they were beyond six months after the damage or negligent act of the Board There was also a submission that only Article 120 of the Indian Limitation Act, 1908 applied and not the special period of limitation provided under section 110 of the Act The learned Judge, on an examination of the relevant provisions of the Act and the authorities placed before him, rejected the insurer's contention that section 110 of the Act would not apply to the case He held that the period of limitation provided in section 110 would apply. But the learned Judge accepted without much discussion the argument that the cause of action for the suits under section 110 of the Act arose only when the subrogee made the payments In that view, the learned Judge, while dismissing C S. No. 4 of 1957 as barred by limitation (there is no appeal preferred against that decision) decreed C S Nos 5 and 6 of 1957 in favour of the insurer as in time. These two suits had been filed within six months of the payment by the insurer to the assured, the payment being within six months of the occurrence of damage.

Before us learned Counsel for the Board questions the tenability of the view of the learned Judge that the cause of action for a subrogee for purposes of limitation is different from the one available to the assured. The reasoning of the learned Judge is that for completing the cause of action for the insurer, besides the damage, there must be payment The learned Judge observes that none can dispute that the cause of action for a subrogee is not the same as the cause of action for the person to whose rights he has become subrogated, because in addition to the facts which constitute the cause of action for the latter the subrogee must allege and prove payment of money which the Board was bound to pay The learned Judge states that while the content of the rights claimed by the subrogee, meaning thereby the relief obtainable, is determined by the content of the right to which he gets subrogated, on the question of limitation the subrogee is not affected by any rule of limitation which applied to the assured. It is the validity of this assumption that is substantially put

in issue in these appeals by Mr V V Raghavan, learned Counsel for the Board. Of course Counsel for the Board would also question the finding of the learned Judge on the question of negligence and learned Counsel for the insurer would maintain the decree with the plea which no doubt has been overruled by the learned Judge, that section 110 gave no protection to the Board and it could not be availed of by the Board at any rate with reference to the suit claims. We may immediately state that we are in entire agreement with the learned Judge on his finding on the question of negligence and his view as to the applicability in general of section 110 of the Madras Port Trust Act The further question arising in the actual application of section 110, when limitation starts to run against the insurer on subrogation to the rights of the assured is a question of some considerable importance and requires careful consideration. Learned Counsel are agreed before us that except for *obiter dicta* by a Division Bench of this Court in *Madras Port Trust* v. *A.M Safiulla & Co.*[1], the matter is *res integra* It will be convenient in the circumstances to first deal with the contention raised by Counsel on either side on the question on which we are in agreement with the learned trial Judge

First to take up the question of negligence of the Board in respect of the goods, there can be no dispute that the Board took charge of the goods under section 39 of the Madras Port Trust Act and the responsibility of the Board for the loss, destruction or deterioration of the goods of which it has taken charge under section 40 of the Act is that of a bailee under sections 151, 152 and 161 of the Indian Contract Act. The Board as a bailee is bound to take as much care of the goods bailed to it, as a man of ordinary prudence under similar circumstances takes care of his own goods. It is a settled principle of law that in a case governed by the provisions of sections 151 and 152 of the Indian Contract Act the loss or damage of the goods entrusted to a bailee is *prima facie* evidence of his negligence. The burden of proof is therefore on the bailee to disprove negligence when damage or loss is established In the present case rain occurred first on the night of the 18th May, 1952 Immediately on the 19th of May, 1952, the agents of the consignor, Messrs Best & Co , wrote a letter, Exhibit P-26 to the Board giving notice of the claim for damages caused to the cotton bales by rain. They pointed out that the bales were stored in the open in the Harbour premises uncovered by tarpaulin No doubt rain in summer about the middle of May is not common in Madras But in the present case the log book maintained by the Board for May, 1952 shows that even on 17th of May, the Port Trust received a telegram from the Madras Observatory which led the Port Trust to continue hoisting distant cautionary signal. The signal had been hoisted even on the previous day as a result of then prevailing weather conditions Showers occurred both on the morning and afternoon of the 19th May also. On the 20th of May the Board received advice from the Madras Meterological Office to replace the distant cautionary signal by local cautionary signal It is needless to refer in detail to the weather conditions during the relevant period, on the 18th of May and on the three subsequent days found in the log book There had been showers and winds with squalls of high velocity. The evidence on record shows that on the 16th of May itself the weather conditions began to show indications of the coming summer storm. Even after the rain on the 18th of May and the letter by the consignor's agents, Messrs Best & Co , the Board had not taken steps to prevent further damage to the goods No attempt was made to requisition and cover the bales of cotton with tarpaulin to avoid further soaking by rain

In this connection reference may be usefully made to the decision of the Privy Council in *Brabant & Co.* v *Thomas Mulhall King*[2]. In that case an action was commenced for damages for the loss and destruction of certain cases of dynamite and other explosive goods which had been stored in the Government Storehouse at Brisbane. They had been stored in sheds near the water-edge and the Government was charged with neglect, in that they stored the goods at too low a level, and further they failed to take reasonable and proper measures to save the goods or

1 (1962) 2 M L J 29

2. L R. (1895) A C 632 at 640.

part thereof on the advent of the floods Settling the principles, the Privy Council observed :

> " Their Lordships can see no reason to doubt that the relation in which the Government stood to the appellant-company was simply that of bailees for hire. They were therefore under a legal obligation to exercise the same degree of care towards the preservation of the goods entrusted to them from injury, which might reasonably be expected from a skilled storekeeper, acquainted with the risks to be apprehended either from the character of the storehouse itself or of its locality : and that obligation included, not only the duty of taking all reasonable precautions to obviate these risks, but the duty of taking all proper measures for the protection of the goods when such risks were imminent or had actually occurred."

In the light of the above principles, on the facts we have no hesitation in agreeing with the learned Judge that the Board did not take care of the goods in the manner expected of a bailee and it continued to be negligent even after the 18th of May when rain had fallen

Next we shall consider the applicability of section 110 in general to a case of negligence of the Board with reference to the goods landed which the Board has taken into its custody for delivery to the consignee. In our view, not much discussion of the law is called for on this aspect of the case, as the matter in so far as this Court is concerned is concluded by the Division Bench judgment of this Court in *Madras Port Trust* v. *A M. Safiulla & Co.*[1], already referred to. The question directly arose in that case even as it required consideration by the learned trial Judge in this case with reference to C.S No 4 of 1957 In fact, the Division Bench refers with approval to this part of the judgment now under appeal Section 110 which provides for notice and limitation of suits or other proceedings runs thus :

> " No suit or other proceedings shall be commenced against any person for anything done, or purporting to have been done, in pursuance of this Act without giving to such person one month's previous notice in writing of the intended suit or other proceeding, and, of the cause thereof, nor after six months from the accrual of the cause of such suit or other proceeding "

The application of this section was opposed on two grounds : (1) that the Board was not a ' person ' for claiming protection under this section, and (2) that the action being by the insurer as a subrogee on his rights acquired by subrogation against the Board and based upon the liability incurred by the Board by its neglect of duty as a bailee, the suit could not be considered to be for anything done or purported to have been done in pursuance of the Act. Mr V. Thyagarajan, learned Counsel for the insurer, referred to several sections in the Act where the Board has been referred to and dealt with distinctly as such and sections where the word 'person' has been used which could not refer to the Board at all Particular emphasis was laid on sections 41 and 41-A which according to learned Counsel brought out clearly the distinction which the Act has made between a person and the Board But under section 6, the Board is a body coporate with perpetual succession and a common seal and shall sue and be sued in the name of the Trustees of the Port of Madras. Section 3 (22) of the Madras General Clauses Act, 1889, defines the word ' person ' so as to include any company or association of individuals whether incorporated or not Section 104 of the Madras Port Trust Act clearly contemplates the possibility of the word ' person ' including the word ' Board ' where the context permits There can be no doubt that the word ' person ' in section 110 is of sufficient amplitude to include the statutory body, the Board created under the Madras Port Trust Act.

On the secod aspect urged in regard to the application of section 110, to appreciate precisely how the liability arose, we have to look at the charge made against the

1. (1962) 2 M.L.J. 29

Board. That the insurer claims by subrogation, may give him only the *locus standi* to maintain the action. But the liability of the Board is not by virtue of the subrogation The liability arose by virtue of its having handled the goods of the assured and stacked them negligently pending delivery to the consignee Clearly its handling and stacking was in performance of functions under section 39 of the Act. Section 40 spcifically provides that the responsibility of the Board for the loss, destruction or deterioration of goods of which it has taken charge would be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act While the Act does not make it obligatory on the part of the Board to undertake the several services contemplated under section 39, by section 39 it certainly empowers the Board to provide all reasonable facilities according to its powers for the services mentioned in clauses (*a*) to (*d*) of section 39 (1) The Board is also empowered to undertake those services The Board shall, under section 39 (2) if required by the owner, perform in respect of goods all or any of the services mentioned in clauses (*a*), (*b*) and (*d*) of sub-section (1) of section 39 Of course the Board could not be compelled to perform any service which it has relinquished under the provisions of section 41-A Sub-section (3) of section 39 provides that the Board shall, if required, take charge of the goods for the purpose of performing the services and shall give a receipt in the prescribed form and to the effect prescribed by the Central Government Among the services enumerated, clause (*b*) refers to receiving, removing, shifting, transporting, storing, or delivering goods brought within the Board's premises First, the contention that mere negligence or omission in the performance of a duty undertaken—may be under the powers conferred by the statute—will not be protected by section 110, does not call for any serious discussion Sections 110 and 111 go together While section 110 deals with notice and limitation of suits or other proceedings, section 111 saves the liability of the Board for acts or default of its employees in certain circumstances In our view a breach of statutory duty as well as an omission to perform a statutory duty would both fall under the protection given by the provisions of section 110 The Board under the Act is to take due care of the goods awaiting delivery to the consignee Section 40 of the Act imposes the responsibility of a bailee on the Board for the loss, destruction or deterioration of the goods it has taken charge of. It is a responsibility which the Board undertakes pursuant to the Act. The Board's default in delivering the goods is closely connected with what the Board has to do in the matter of receiving, removing, shifting, transporting, storing or delivering goods brought within the Board's premises. The services which the Board has to perform and could perform statutorily under the statutory powers and duties cannot be dissociated from its omissions and failures in relation to the goods. Any action which is called for will properly be covered by the words 'anything done or purporting to be done in pursuance of this Act.' Under the Madras General Clauses Act, 1899, words which refer to the acts done extend also to illegal omissions. On this question we have the weighty authority of the Judicial Committee which had to construe the corresponding provision in section 142 of the Calcutta Port Act, 1890, which runs in these terms·

> "No suit shall be brought against any person for anything done or purporting or professing to be done in pursuance of this Act, after the expiration of three months from the day on which the cause of action in such suit shall have arisen"

The Judicial Committee observed in *Calcutta Port Commissioner* v *Corporation of Calcutta*[1] thus:

> "The respondents argued that the Indian statute fell to be strictly construed, and that while it protects against a claim based on breach of statutory duty, it does not protect against an omission to perform a statutory duty Their Lordships are unable to accept either argument. The argument is unsupported by authority, or from any other source"

1. L.R. 64 I A. 363: (1937) 2 M L.J 594 I L R (1938) 1 Cal 440 at 449.

Nor can protection under section 110 be taken away on the ground that the Board is free to undertake or not the services and the performance of the services on the requirement of the owner cannot be construed to be anything done or purported to be done in pursuance of the Act. May be it is optional for the Board to undertake the services and may be the owner's request has to be there to make it obligatory; but it is undeniable that it is in pursuance of the powers given under the Act the services are undertaken Section 110 speaks of anything done' in pursuance' of the Act The language is of sufficient amplitude to cover even the class of functions for which no duty is cast by section 39 (1) but only power is given to undertake them. In *Griffiths and another* v. *Smith and others*[1], the question was whether the English Public Authorities Protection Act, 1893, would protect the managers of a non-provided school who were found to be a public authority under the Act, from an action for damages by an invitee to an exhibition in the school, who was injured through the collapse of a floor due to want of repair. Section 1 relied upon ran as follows ·

> " Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution, or intended execution of any Act of Parliament or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provision shall have effect (*a*) the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within 6 months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six month next after the ceasing thereof. ... .."

Posing for consideration the question whether the neglect or default proved against the managers could be considered to be in the execution of their statutory duty or authority, Viscount Simon, L C said that the question must be answered in the affirmative. The Lord Chancellor said.

> " The real question is whether the managers, in authorising the issue of invitations to the display on the school premises after school hours, should be regarded as exercising their function of managing the school. ....It would be within the discretion of the managers to decide whether they would approve such a display or whether they would not. The point is, however, that they did approve it, and that they did so in the course of carrying on this public elementary school and of exercising the powers of management conferred upon them by the Education Act "

Viscount Maugham in his speech said.

> " It is sufficient to establish that the act was in substance done in the course of exercising for the benefit of the public an authority or a power conferred on the public authority not being a mere incidental power, such as power to carry on a trade The words in the section are ' public duty or authority ', and the latter word must be taken to have its ordinary meaning of legal power or right and does not imply a positive obligation "

With great appositness we may refer also to the decision of the Judicial Committee in *Firestone Tyre and Rubber Co.* v *Singapore Harbour Board*[2], where in an action for damages for short delivery of goods landed in Singapore Harbour by the Singapore Harbour Board which under the Singapore Ports Ordinance was authorised to carry on the business of wharfingers and warehousemen and was carrying on for the benefit of the public within the statutory powers, the applicability of the Public Authorities Protection Ordinance which is similar to the language to the English Public Authorities Protection Act was considered True the relevant sections in the English

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. (1941) 1 All E R 66 at 70, 72 and 76 2 L.R (1952) A C 452.

Public Authorities Protection Act, 1895 and the Singapore Ports Ordinance specifically contemplate protection even in respect of neglect or default in the execution of any Act or public duty or authority. But the relevance of these citations is with reference to their interpretation of the words 'any act done in pursuance or execution, or intended execution,' to show that the duty undertaken by the Board or its act which has given rise to the cause of action need not necessarily be an obligatory one. In *Firestone Tyre and Rubber Co.* v. *Singapore Harbour Board*[1], the Judicial Committee observed.

> "The board, having constructed or become possessed of warehouses, which must be regarded as a normal and necessary adjunct to a port such as Singapore, could elect whether to let them out to others for periods less than three years (or with consent of the Governor for longer periods) or themselves to operate them as wharfingers and warehousemen and levy rates for the wharfage or storage of goods therein. Having chosen the latter alternative they did not thereby cease to function as a harbour board and undertake some purely subsidiary activity of a non-public nature They were supplying facilities essential to the shipping community in one of the ways authorised by the Ordinance by which they were created a harbour board charged with the management and control of the port, and were thus fulfilling one of the main purposes for which they had been given statutory powers."

The Judicial Committee further said

> " Furthermore, as previously stated, the existence or non-existence of a contract is not a decisive test, and on the facts of the present case their Lordships are clearly of opinion that the question of contract is immaterial to their decision since, on any view, the board were exercising their permissive powers to perform a normal function of a harbour board and in so doing were providing a service essential to the shipping and commercial community of Singapore and accordingly entitled to the protection of the Public Authorities Protection Ordinance."

The language of section 110 of the Madras Port Trust Act which we have to interpret is wider in its scope and quite plain and emphatic The protection of the section would be available in respect of anything done or 'purported to have been done' in pursuance of the Act The Singapore Ordinance even as the English Act did not contain the words 'purported to have been done in pursuance of the Act.' It protected only acts done in pursuance of or execution or intended execution of any Act. Srill the Privy Council said that the harbour board has the protection of the Ordinance as they were supplying facilities to the shipping community in one of the ways authorised by the Ordinance, which created the Board, and were fulfilling one of the main purposes to which they had been given statutory powers. In *Calcutta Port Commissioner* v. *Corporation of Cacutta*[2], referring to the words 'purporting or professing to act in pursuance of the statute' in section 142 of the Calcutta Port Act, the Judicial Committee observed:

> " Their Lordships regard these words as of pivotal importance Their presence in the statute appears to postualte that work which is not done in pursuance of the statute may nevertheless be accorded its protection, if the work professes or purports to be done in pursuance of the statute "

No doubt section 110 does not contain the word 'professing' But that, in our view cannot make any difference to the applicability of the observations of the Judicial Committee Once the Board assumes functions under the Act whether optional or obligatory, it can call in aid the protection afforded by section 110 Apart from the decision of the Division Bench of our own Court in *Madras Port Trust* v *A M. Safiulla & Co*,[3] we have on this question the decision of a Division Bench of Calcutta

1. (1952) A C 452 at 467 at 468
2. I L R (1938) 1 Cal 440 at 448 =L R 64 I A. 363 (1937) 2 M L J 594
3. (1962) 2 M L J. 29 at 33 and 34.

High Court in *Commissioner for the Port of Calcutta* v *Kaitan Sons & Co.*[1]. In *Madras Port Trust* v *A. M Safiulla & Co* [2], also the charge against the Board was improperly stacking goods without taking sufficient precautions to keep them safe from being drenched in rain, and this Court observed.

> " The fulfilment of a statutory duty by the Board is not merely the literal obedience to the letter of the Act but is also the carrying on of things and matters which are incidental to and necessary for the proper and effective discharge of that duty .. .. We have no difficulty in holding that the defendants received and stacked the goods in the special platform in the harbour premises purporting to discharge their statutory function in pursuance of the Act "

The fact that the suits now under consideration have been instituted by the insurer cannot make any difference to the applicability of section 110 The action being in respect of a matter covered by section 110, the protection of that section is not taken away by reason of the fact that the suit is not by the owner or consignee of the goods but by the insurer The liability of the Board for damages is its neglect of duties as a bailee and the insurer's claim in substance is to enforce that liability. The substantial cause for the suit is the same whoever figures as the plaintiff—whether it be the consignee or the insurer. The indisputability of this position becomes manifest presently when we discuss the juridical basis of the insurer's rights on his paying the assured

We shall now take up the really substantial point for consideration by us, the question when time begins to run for an action like the present one by the insurer as subrogee In *Madras Port Trust* v. *A M. Safiulla & Co* [2] though *obiter*, it is stated:

> " The subrogee's right is just the same as that of the person whose rights are subrogated. The subrogee steps into the shoes of his assignor and can have no higher rights than his assignor The cause of action in a case governed by section 110 gets barred after the lapse of six months subsequent to its accrual. The fact that the subrogee gets a complete cause of action only after payment to his assignor cannot give an extended period of limitation to the subrogee by computing the period of six months from the date of subrogation The recognition of a fresh starting point of limitation in favour of the subrogee from the date of subrogation may lead to the anomaly of reviving barred claims."

Proceeding it is said:

> " It is however unnecessary to express any opinion on the question whether the subrogee may sustain a claim under section 110 of the Act though such a claim is unenforceable by his assignor."

It has therefore become necessary to examine the matter carefully somewhat at length. Mr. V. Thyagarajan, learned Counsel appearing for the insurer, stressed that time would not run against a person who cannot act and the subrogee had no right of action till payment Learned Counsel emphasised that the cause of action for the suit of the subrogee was his settlement with the assured, and that but for satisfaction of the claims of the assured by payment he could not file the suits Reference was made to Lord Esher's definition of a cause of action as ' every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court ' But the question for consideration is not when the insurer acquired his right to sue. That would be relevant when limitation begins to run from when the right to sue accrued as in Article 120 of the Limitation Act, 1908 We have to consider the language of section 110 which provides a specaial period of limitation, and find out therefrom when time begins to run in favour of the person sought to be sued. Section 110 provides for two things as a pre-condition to suits contemplated thereunder (1) one month's previous notice in writing of

3. A.I.R. 1966 Cal. 190.

2. (1962) 2 M.L.J. 29 at 33 and 34.

the intended suit and of the cause thereof, and (2) the suit shall not be commenced after six months from the accrual of the cause of such suit The starting point for limitation is the accrual of the cause of the suit The expression "such suit" immediately takes us to the suit described earlier, that is, the suit for anything done or purported to have been done in pursuance of the Act It is the cause of that suit that has to be set out in the notice and it is from the accrual of that cause, the period of six months starts running When we are on a special period of limitation and it gives its own starting point, we are bound to apply that notwithstanding any inconvenience that may arise from its literal application Learned Counsel contends that an insurer may pay an assured his claim on the last day of the six months' period' since the neglect or damage complained of It is said that in such a case the insurer would be left without the equitable remedy of reimbursement from the wrong-doer and this cannot be the intendment of the enactment But there is no ambiguity in the section The language is clear and the inconvenience suggested is not unsurmountable Section 110 is modelled on the lines of similar provisions protecting public authorities from delayed actions A shorter period of limitation in respect of actions against them is provided In England prior to June, 1954 actions against public authorities were in general subject to a limitation period of one year Now there is no difference One may see some reason behind the rule providing a shorter period of limitation, there may be difficulties in public authorities whose officers will be changing or retiring, in preserving and securing evidence if actions are unduly delayed. We do not think that the protection afforded to the Trustees of the Port Trust having regard to the volume and variety of work they have to handle is anything unusual to liberally construe section 110. It has been judicially noticed that insurance companies often protected themselves in their contracts providing a period of time for the subsistence of the rights of the assured against them generally three months, from the rejection of the claim by the insurer. We cannot say that the Trustees have less need of the protection afforded by the statutory compulsion for acceleration of the proceedings that may be brought against them It may also be in public interest that such claims are speedily settled Whether any discrimination in this regard is justified or not, we have to interpret the section as it stands and apply the law.

It is a well-established principle of the law of limitation that time which has once begun to run will as a rule continue to do so No subsequent disability or inability to sue stops it—see section 9 of the Limitation Act, 1908 The learned Judge at the trial, when he observed that the subrogee is not affected by any rule of limitation which applies to the other person, overlooks the position of the subrogee in law and the rights he acquired by subrogation The doctrine of subrogation comes in where one person has a claim against another and a third person is in certain circumstances allowed to have the benefit of the claim and the remedy for enforcing it, although it has not been assigned to him Section 130-A of the Transfer of Property Act provides when and how a policy of marine insurance may be transferred, and section 135-A with the subrogation with which we are concerned runs thus :

"(1) Where a policy of marine insurance has been assigned so as to pass the beneficial interest therein, the assignee of the policy is entitled to sue thereon on his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

(2) Where the insurer pays for a total loss, either of the whole, or, in the case of goods, of any apportionable part, of the subject-matter insured he thereupon becomes entitled to take over the interest of the insured person in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the insured person in and in respect of that subject-matter as from the time of the casualty causing the loss.

(3) Where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon suborgated to all rights and remedies of the insured person as from the time of the casualty causing the loss in so far as the insured person has been indemnified by such payment for the loss

(4) Nothing in clause (*e*) of section 6 shall affect the provisions of this section "

By virtue of section 135-A the insurer on payment to the assured steps into the shoes of the assured and acquires all his rights and remedies "as from the time of the casualty causing the loss" The bar of transfer of a mere right to sue is removed, and the remedies available to the assured get vested in the insurer on his paying the assured Clearly the insurer gets himself substituted for the assured *vis-a-vis* the wrong-doer and the substitution takes effect from the time of the casualty causing the loss In regard to the liability of the wrong-doer, that is, the person liable for the loss, on the language of these provisions it is plain that no different cause of action arises in favour of the insurer Neither the character nor extent nor content of the original liability of the wrongdoer is changed or affected by the subrogation; and the insurer's rights and remedies date from the time of the casualty causing the loss. These provisions found in the Transfer of Property Act which apply to the cases on hand are now found in section 79 of the Marine Insurance Act, 1963, which repeals sections 130-A and 135-A of the Transfer of Property Act We may here point out that section 135-A of the Transfer of Property Act and section 79 of the Marine Insurance Act, 1963 which replaced the former are just *verbatim* reproductions of section 79 of the British Marine Insurance Act, 1906 Subrogation with reference to insurance as such, is not defined in the Transfer of Property Act, but we have the definition of subrogation in section 92 of the Transfer of Property Act in relation to mortgages and its principles are well known The effect of subrogation is to place the insurer in the shoes of the assured and enable the insurer to recover the amount from the person who ought to have paid. It confers on the insurer no greater rights. Nor does it provide him with further remedies than the assured himself had at the time he was paid off and the insurer got subordgated. Of course it is the payment to the assured that subrogates the insurer to the assured's rights against the wrong-doer Without such payment there can be no subrogation But the payment does not extinguish the liability of the wrongdoer or the other person responsible for the loss to the assured Only the benefit of this liability, when subsisting enures to the benefit of the insurer The insurer has to rest uopn the cause for action which had accrued to the assured when he got himself subrogated It may not be that in every case of loss a third party is liable to the assured, the assured might have acquired by contract absolute indemnity against loss and the insurer might not be able to recover anything from the third pary for subrogation The assured may have really no cause of action against the alleged wrong-doer, though the insurer has to pay him Before the insurer can recover under the doctrine of subrogation, he will have to establish the cause of action and liability of the wrong-doer for damages He must establish that it is the negligent act of the party proceeded against that was the proximate cause of the damage to the property of the assured

Contracts of insurance are considered really as contracts of indemnity and the principle of subrogation is applied to it being an equitable arrangement incidental to all contracts of indemnity and to payments on account of the indemnity Subrogation is an equity rule and the equity of subrogation arises as the assured has concurrent remedies for relief from the loss against the person responsible for the loss, say on contract or tort, and also against the insurer on the contract of insurance, each independent of the other And equity will not permit the injured to be doubly compensated by the insurer and the person liable for the loss On payment to the assured by the insurer in terms of his policy the doctrine of subrogation steps in and vests in the insurer the rights the assured has against the person who has caused the loss. He succeeds to all the ways and means by which the assured may have

reimbursed himself for the loss from the person responsible for the loss. Arnould in his classic on Marine Insurance (British Shipping Laws Vol 10, page 1193) states the position thus

> "..... . it is entirely foreign to the spirit of contracts of indemnity that a person damnified should recover his loss more than once, it is, therefore, clear that if he has already recovered from a third party, there can be no liability under the contract of indemnity On the other hand, if he has not previously recovered from such third party, but has the right to do so, there is no reason why such third party should be allowed to allege that his liability has been satisfied or reduced by a payment made by a stranger to him, under a contract with which he has nothing to do The third party remains liable to the person indemnified just as if there had been no contract of indemnity. But the person indemnified can only take the sum recovered from the third party as trustee for the indemnifier, and similarly, if he has not himself received any sum to which he is entitled, he is bound to afford the latter all facilities for doing so In practice, the commonest way in which the principle of subrogation is applied to insurance, is for the insurer to pay the claim of the assured, and then to institute proceedings in the name of the latter, but for his own benefit, against the party ultimately liable "—Para 1215

In the Law of Insurance by Preston and Colinvaux, 2nd Edition, at page 128 we find the position stated thus·

> "The right of 'subrogation' rests upon the ground that the insurer's contract is in the nature of a contract of indemnity and that he is therefore entitled, upon paying a sum for which others are primarily liable to the assured, to be proportionately subrogated to the right of action of the assured against them"

In Macgillivray on Insurance Law, 5th Edition, para. 1882 the learned author points out that the right of subrogation is a corollary of the general principle that insurance, is only a contract to indemnify the assured, that the insurer's right of subrogation arises whenever he pays a loss for which he is liable under his policy, and that it arises upon payment of a partial as well as upon payment of a total loss. The learned author states in para. 1886 .

> "The legal right to compensation remains in the assured, and, therefore unless there has been an express assignment of the legal right, actions at law brought for the benefit of the insurer are brought in the name of the assured. In Courts of Equity or of Admiralty the insurer has always been allowed to sue in his own name."

In Porter's Laws of Insurance, 8th Edition, at page 232 the position is stated thus :

> "The insurer having contracted to indemnify, could not insist on others being sued first who were primarily liable, or on consolidation of his action with others by the same assured against other insurers in respect of the same loss. The mere payment of a loss by the insurer does not afford any defence to a person whose fault has been the cause of the loss in an action brought against the latter by the assured. But the insurer acquired by such payment a corresponding right in any damages recoverable by the assured against the wrong-doer or other party responsible for the loss."

At page 237, the learned author points out :

> "An insurer suing the party through whose fault the loss occurred can only assert the right of the assured, and will be subject to any defences or equities which would be good against him The insurer stands in no relation of contract or privity with such a party His title arises out of the contract of insurance, and is derived from the assured alone, and can only be enforced in right of the latter. Thus, where damage occurred through contributory negligence, that defence would be an answer to the action of the subrogated insurer Again, if two ships of the same owner collided by the fault of one to the destruction of the other, the insurer could not sue the owner, since they claim under him."

Having regard to the universality of the subject under consideration we may point out that similar views are expressed on the insurer's right of subrogation in the opinion of the Supreme Court of the United States of America in *St. Louis, I M. & S. R Co.* v *Commercial Union Ins Co* [1] It is thus seen that an insurer's rights are not higher than that of the assured and that he has no independent cause of action against the wrong doer In fact he claims under the assured standing in his shoes and asserting his rights Only, on payment, *pro tanto*, without more, he gets substituted for the assured in relation to the person who is responsible for the loss and is answerable for the loss. And this substitution occurs without reference or leave of either that person or the assured In Stroud's Judicial Dictionary, 3rd Edition, volume 4, at page 2896, quoting Dixon on Subrogation, subrogation is defined thus :

> "'Subrogation' is the substitution of another person in the place of a creditor to whose rights he succeeds in relation to the debt . Subrogation differs from a transfer or assignment of a debt, and from delegation, in the circumstances that it does not, necessarily, depend upon the creditor, but may be made independently of him It is, properly speaking, but a fictitious cession made to one who has a right to offer payment ; it is not a true cession nor sale of a debt, but such as is conceded by law and may have effect by operation of law and the act of the debtor, even without the consent of the creditor from whom the debt proceeds."

Under the Limitation Act plaintiff includes any person from r othrough whom he derives his title to sue. The particular definition may not apply here, but the insurer who derives his rights standing in the shoes of the assured, unless statute provides to the contrary, cannot claim a different period of limitation. The special law with which we are concerned, section 110 of the Madras Port Trust Act, makes no distinction as to who happens to be the plaintiff As under the English law the insurer has to sue in the name of the assured, no question of different period of limitation could arise there In fact an additional ground is sought to be raised in these cases in appeal that the suits by the plaintiff alone are not maintainable. Being taken for the first time and having regard to the nature of the objection we have not permitted the raising of the new point at this stage For the insurer, the decision of the Calcutta High Court in *Alliance Assurance* v. *Union of India*[2], is cited for the position that in view of section 135-A of the Transfer of Property Act, there is no bar in this country to the institution of suits by the insurer in his own name As we have not heard any arguments on this question and as in the view we take of the other question, it is unnecessary to decide it, we are not expressing any considered views on it. In *Simpson and Co* v. *Thompson Burrell*[3], it is observed by the House of Lords :

> "In England, the action must be in the name of the shipowner, not of the underwriters I think this material as showing that it is the personal right of action of the shipowner, the benefit of which is transferred to the underwriters In other systems of jurisprudence, or it may be in our own as altered hereafter the assignee of such a right may be able to sue in this own name"

Sheldon in his Law of Subrogation, 2nd Edition, while defining subrogation, says at page 3 :

> "It is a legal fiction, by force of which an obligation extinguished by a payment made by the third person is treated as still subsisting for the benefit of this third person, who is thus substituted to the rights, remedies, and securities of another. The party who is subrogated is regarded as entitled to the same rights, and indeed *as constituting one and the same person with the creditor whom he succeeds.*"

This being the true position of an insurer and the *persona* of the assured is continued in him for the purposes of recovery from the wrong-doer or person responsible for the loss, we fail to see how it can be claimed that a fresh period of limitation starts

1 139 U S 154, 35 Law Edn 155.
2. (1958) 62 Cal.W.N. 539.
3. (1877) L R. 3 A C 279 at 293.

for the insurer on his paying the assured. He has no independent claim of his own against the person responsible for the loss and even though he has instituted the suit in his own name, he must be regarded as the assured himself—see Sheldon quoted above. The Board in this case, on expiry of the period of six months, can claim a complete defence to any action against it by the consignee or owner for any negligence or default in the due delivery of goods landed and taken charge of by it. On what principle is this protection taken away on the insurer taking the place of the consignee or owner, when the substitution is without reference to the Board and when there is no new contract or fresh liability incurred by the Board on the substitution? The Board is not directly liable to the insurer and can be called upon to pay only what it may have to pay to the consignee or owner. General considerations and the principle of subrogation above discussed do not call for an interpretation of section 110 to permit extending the period prescribed. This is not a case of contribution between joint tort-feasors or co-sureties or several insurers who have insured against loss from the same perils the same property where the liability is against the joint tort-feasors or co-sureties or co-insurers *inter se* arises for the first time on payment by one of the entire or more than their proportionate share of liability. Here what the insurer has to enforce is the very liability which the assured could have enforced, that is the primary liability Only the insurer has taken his place The cause for action against the defendant is of the assured Time under section 110 of the Act started running against the assured in favour of the defendant on the occurrence of the 'casualty causing the loss' in the language of section 135-A of the Transfer of Property Act. In the light of the above discussion we have no hesitation in the circumstances in holding that the claims against the Board in actions falling under section 110 of the Madras Port Trust Act like those now under consideration whoever figures as the plaintiff—whether it be the assured or the insurer—must be within six months from the accrual of the cause for the claim by the assured against the Board. There can be no fresh start under section 110, on the insurer getting subrogated to the rights of the assured. We may by way of analogy usefully refer here to the view of the majority of the Judges in the Full Bench case, *Valliamma Champaka* v. *Sivathanu Pillai*[1], where the question of limitation on subrogation arising with reference to a redeeming co-mortgagor arose for consideration. At page 169 Ramachandra Iyer, C J., observes:

"It is argued for the appellant that as the redeeming mortgagor becomes a mortgagee with respect to his co-mortgagors on redeeming the main mortgage, he should be deemed to become a mortgagee from that time, the period of fifty years prescribed by Article 136 of the Travancore Limitation Regulations should be reckoned from the date of payment and redemption. I cannot accept this contention In a subrogation what the redeeming co-mortgagor obtains is a right to stand in the shoes of the mortgagee whom he had satisfied and, as pointed out in *Mamundi* v *Somasundaram*[2], if the person claiming subrogation wants to enforce his rights over the mortgage redeemed, he would be governed by the rules of limitation which would be applicable to the mortgage redeemed."

It is not contended that the suits under appeal would be in time if limitation commenced from the act of negligence of the Board complained of which resulted in damages. These suits, if they had been instituted by the assured himself, would have been barred by limitation and met successfully by the Board with the plea of limitation. It follows that the decrees in the two suits in question have to be set aside and the suits dismissed. The appeals are therefore allowed. On the question of costs the Board has been found responsible for the damages It is succeeding only on the point of limitation and on that, the learned trial Judge has taken a different view. In the circumstances the parties will bear their respective costs in the trial Court. The appellants will be entitled to their costs in the appeals.

S.V.J. —— *Appeals allowed.*

1. (1964) 1 M L J 161 (F B) at 169.
2. I.L.R. (1959) Mad. 883 : (1959) 2 M.L.J. 122.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE P RAMAKRISHNAN AND MR. JUSTICE R. SADASIVAM.

Abdul Kader .. *Appellant**

Criminal Procedure Code (V of 1898), section 288—Evidence given under—If substantive evidence, not requiring corroboration—Evidence, given in the committal Court not adhered to by the witness in the Sessions Court—If could be used to corroborate a retracted confession—Conviction under 302, Indian Penal Code.

Evidence admitted under section 288, Criminal Procedure Code, is substantive evidence which does not really require corroboration. In fact, section 288, Criminal Procedure Code, does not contain any such qualification that the evidence admitted under it should not be used without corroboration It is true, the evidence given in the committal Court, which is not adhered to by the witness in the Sessions Court, should not be lightly admitted by virtue of section 288, Criminal Procedure Code, and it can be acted upon as substantive evidence only if the Court is completely satisfied that it is true The evidence brought on the records of the case under section 288, Criminal Procedue Code, can be made use of to corroborate a retracted confession Once the evidence before the committing Court is admitted, it stands exactly on the same level as any other evidence in the case.

In the present case, the truth of the version in Exhibit P-2 (*i e*, the evidence of P.W 2 in the committal Court) is by itself sufficient, along with other pieces of circumstantial evidence, to find the appellant guilty under section 302, Indian Penal Code.

Appeal against the Judgment of the Sessions Judge of the Court of Sessions of the Tiruchirapalli Division at Tiruchirapalli, dated 24th August, 1967 in Case No. 43 of the Calendar for 1967.

T. S. Arunachalam, for Appellant

The Public Prosecutor on behalf of the State

The Judgment of the Court was delivered by

Sadasivam, J—Appellant, Abdul Kader, has been convicted under section 302, Indian Penal Code for having caused the death of his wife, Kathija Bibi, by stabbing her several times with a bichuva at about 7-30 A M. on 24th January, 1967 in his house at Varpet Village, and sentenced to imprisonment for life There can be no doubt in this case that the appellant and his wife Kathija Bibi were not on good terms. The learned Sessions Judge has however observed in paragraph 13 of his judgment that the motive for the murder is not clear. P W 2, Fathima Bibi, the mother of the appellant, who was permitted to be cross-examined by the Public Prosecutor, has stated in her evidence that there used to be quarrels between the appellant and the deceased because of the appellant suspecting the fidelity of his wife. In fact, the appellant has married again. The appellant does not also dispute the fact that he has married again. It is also an undisputed fact that the appellant wrote the letter Exhibit P-8 and sent it in the envelope Exhibit P-9 from Madurai on the day prior to the occurrence to his father-in-law, P W. 10, Kadir Batcha, living in Samboothi Village, which is at a distance of 15 miles from Varpet village of the appellant. In that letter the appellant has stated that he had divorced his wife and that P W. 10 could come and take his daughter home The evidence of P.W. 10 shows that he received this letter shortly after he received information about the occurrence in this case.

The appellant is a vendor of ready-made clothes at Madurai About eight days prior to the occurrence in this case, he brought his mother (P W. 2), his wife, Kathija Bibi, and his two children, a boy and girl, the former being 3½ years old to live in his house in the village of Varpet. The appellant came to the village on

* Crl.A. No. 661 of 1967. 28th November, 1967.

the morning of 24th January, 1967 and the occurrence in this case took place within a short time thereafter P.W 2 was in the house with the deceased and the two children P W 1, Kadir Bibi, is the sister of P W 2 Though she lives with her son in a house at a distance of 1½ furlongs from that of the appellant, she looks after her grocery shop, which is just opposite to the house of the appellant She used to open this shop between 7 and 8 A M It is clear from the evidence of both P Ws. 1 and 2 that when the appellant came to his house on the morning of the date of occurrence, there was none else in his house except P.W 2, the deceased and the two children. The evidence of P W. 2 in the Sessions Court is that when the appellant came home, he started abusing her, pushed her down and she became unconscious and she did not know anything about the occurrence in this case She was permitted to be cross-examined and she was cross-examined with reference to her statement recorded under section 164, Criminal Procedure Code, which supports the prosecution case. In that statement she has explained how she sustained injuries while she dragged her son when he was attacking Kathija Bibi The evidence given by her in the committal Court has not been marked under section 288, Criminal Procedure Code. The statement given by P W 2 under section 164, Criminal Procedure Code can be used only to contradict her evidence and it cannot be treated as substantive evidence.

P W. 1 Kadir Bibi, deposed that she saw the appellant entering his house and a little later heard cries of alarm from inside the house, went there and found the appellant standing near the deceased, who was lying in her back flat on the ground, and her sister P.W 2 standing nearby Her evidence in the Sessions Court is that after witnessing the same, she came out in order to go and report to her son that the deceased was lying on the ground, perhaps, unconscious The Public Prosecutor was allowed to cross-examine this witness with reference to her prior statement Exhibit P-1 recorded under section 164, Criminal Procedure Code and the evidence given by her in the committal Court. The evidence given by this witness in the committal Court has been admitted under section 288, Criminal Procedure Code and marked as Exhibit P-2. In Exhibits P-1 and P-2, P.W. 1 has stated that on hearing the cries from inside the house of the appellant, she ran there and saw the appellant with a knife in his hand In Exhibit P-1 she has stated that she saw the appellant trampling the neck of Kathija Bibi by his right leg and that she ran away in fear. In her evidence in the committal Court she has stated that she saw the appellant having his right leg on the neck of the deceased and having a knife in his hand, that she got frightened and left the place to call her son. One important question for determination in this case is, whether the version given by P.W. 1 in Exhibit P-2 is true.

On hearing the alarm, several persons gathered at the house of the appellant. P W. 3, Jalaluddin, P W. 4, Mohammad Sherif, and P W. 5, Mohammad Kassim, who are all residing nearby, learnt at the house of the appellant that he had left the place with a bundle in his hand and went to search and catch him. In fact, they proceeded on cycles and they were able to spot the appellant at a distance of four furlongs away from Ponnamaravathi near Alagunachiamman temple, walking along the road carrying a bundle They stopped him and questioned him about the murder. The appellant told them "I murdered my wife. Who are you to ask? I am myself going to the Police" P Ws 3 to 5 were not willing to trust the appellant and therefore accompanied him to the Police Station. The Sub-Inspector of Police (P W 12), Ramadoss, recorded Exhibit P-4 to the dictation of P W. 3 and got the attestation of P.Ws. 4 and 5. He arrested the appellant and examined the contents of the cloth bundle brought by him and it contained the weapon M O 1 and the clothing of the appellant. Subsequently, chemical analysis showed that the clothing were stained with human blood, the blood-stains on the weapon had disintegrated.

P.W. 9, Dr. Gnanavaram, Medical Officer, attached to Government Pappayee Hospital at Valayaptti, conducted the post-mortem on the body of Kathija Bibi at 9-30 A M. on 25th January, 1967 and found as many as thirteen injuries, several of them being stab injuries on the chest. The Doctor gave his opinion that most of

the vitial organs of the deceased were found to be injured and death must have been instantaneous It is necessary to refer to only one of the injuries, namely, the fifth injury, which had pierced the right auricle of the heart to half an inch. There can be no doubt that it was a fatal injury. In fact, the Doctor's evidence is that the injuries caused to the vital organs were necessarily fatal

The Doctor examined P W 2 and noted two simple injuries sustained by her and alleged to have been caused in the course of the same transaction by the same weapon at about the same time The prosecution case appears to be that these injuries were sustained by P W. 2 when she intervened to prevent her son attacking the deceased. We have already pointed out that the evidence of P W 2 is that the appellant first attacked her and she became unconscious.

During his examination under section 342, Criminal Protcedure Code, the appellant stated as follows in the committal Court:

> " On that day I came to village. At that time Peer Mohammad, a boy, jumped and ran away from my house I went in My wife was murdered. I have reported to Police and handed over the knife They have arrested me in a wrong conclusion. Peer Mohammad is the real culprit "

He gave a more detailed version on the same lines in the Sessions Court:

> " When I entered the house, Peer Mohammad ran out. I saw my wife lying flat on the ground I lifted her to see as to what the matter was She was bleeding injuries It is thus that my clothes became blood-stained Since I was perplexed and wanted to report the matter to the police and laid the body of my wife down, I noticed a knife lying nearby There was also a sheath. I changed my dress because it became blood-stained, took the same along with the knife and the sheath bundling up in my towel and straight went to Ponnamaravathi Police Station P Ws 3 to 5 came armed with sticks—3 or 4 persons came—I told them 'why have you come with sticks? I am going to the police station.' They accompanied me to the police station. I made a report at the police station I do not know what they recorded but I put my signature Next day I was sent to Tirumayam for being remanded "

The appellant has given the above version to explain the blood-stains on his clothes and his having appeared at the Police Station with the weapon M O 1

The learned Advocate for the appellant brought to our notice that a judicial confession had been recorded from the appellant and commented on the fact that it has not been marked in this case But, on his showing the document, we find that the appellant has not really made a confession of the offence of murder He has merely stated therein that when he went home, he found his wife lying dead with injuries. In the said confession he has not even put forward the plea that Peer Mohammad came out of the house The prosecution evidently has not filed the said judicial confession, as the appellant has not really made any admission of his having committed the offence in this case Hence, no comment can be made against the prosecution by reason of its not having examined the Sub-Magistrate and proved the said judicial confession It would no doubt have been better for the prosecution to have adduced evidence about the said judicial confession, to avoid such comment. Further, it would have been valuable for the prosecution itself to show that the appellant has not come forward with the present version But, as the judicial confession has not been marked in this case, we have to ignore it and we cannot base our judgment on anything contained or not contained in it

The learned Advocate for the appellant urged that the retracted extra-judicial confession of the appellant, which requires corroboration, cannot be said to be corroborated by the evidence of P W 1 in the committal Court admitted under section 288, Criminal Procedure Code In *Queen Empress* v *Bharmappa*[1], a Bench of this Court has held that when a prisoner was convicted of murder on a confession, retrac-

1. (1889) I.L.R. 12 Mad. 123.

ted at the trial, corroborated by depositions read under section 288, Criminal Pro-Procedure Code and also retracted at the trial, the prisoner should not have been convicted on such evidence. The judgment is a very brief one and it does not contain reasons why the learned Judges thought that the depositions read under section 288, Criminal Procedure Code, retracted at the trial, cannot be used to corroborate a retracted confession Evidently, the judgment is based on the fact that both pieces of evidence, in the opinion of the learned Judges required corroboration. But in a series of decisions of this Court and the Supreme Court, it has been held that evidence admitted under section 288, Criminal Procedure Code is substantive evidence, which does not really require corroboration In fact section 288, Criminal Procedure Code does not contain any such qualification that the evidence admitted under it should not be used without corroboration It is true, the evidence given in the committal Court, which is not adhered to by the witness in the Sessions Court, should not be lightly admitted by virtue of section 288, Criminal Procedure Code and it can be acted upon as substantive evidence only if the Court is completely satisfied that it is true. In the Bench decision of the Travancore-Cochin High Court in *Narayana Pillai* v. *State*[1], the entire case-law has been discussed and it has been held that evidence brought on the records of the case under section 288, Criminal Procedure Code can be made use of to corroborate a retracted confession The principle that a retracted confession cannot be acted upon, in the absence of corroboration in material particulars, is referred to in that decision The decision in *Queen' Empress* v *Bharmappa*[2], has been referred to in that decision and it is pointed out that how the view expressed in that decision and in the decision in *Empress* v. *Jadub Das*[3], to the same effect, cannot be accepted, in view of the later decisions of the Madras High Court and other High Courts as to the effect of evidence admitted under section 288, Criminal Procedure Code. It has been held by the Travancore-Cochin High Court, on the basis of the decisions in *Velliah Kone* v *King Emperor*[4], and *B Peda Somadu* v *Nethipudi Appigadu*[5], that evidence brought on the records of the case under section 288, Criminal Procedure Code can be made use of to corroborate a retracted confession. In both the above Madras decisions it is pointed out that the evidence admitted under section 288, Criminal Procedure Code is substantive evidence In *Velliah Kone* v *King Emperor*[4], Odgers, J , has clearly stated that under section 288, Criminal Procedure Code and the authorities referred to by him, once the evidence before the committing Court is admitted, it stands exactly on the same level as any other evidence in the case It was held in that decision that the evidence given before the committing Magistrate could be corroborated by a previous statement taken before a competent investigating authority and that the use of such material for corroboration cannot be confined to evidence taken at the trial. In *B Peda Somadu* v *Nethipudi Appigadu*[5], Wallace, J , has pointed out that the broad principle to be observed clearly is that where witnesses are so careless of the truth as to abandon readily on oath what they have previously sworn on oath, their statement on any point should not be accepted without great caution and sound judicial reasons for accepting as true anything they have said The learned Judge has also observed that some times this principle has been interpreted in particular cases to mean that sound judicial reasons are absent unless there is independent corroboration on material particulars It is true that when the Court considers that the evidence of a particular witness given in the committal Court and retracted at the Sessions Court requires corroboration, it is possible to argue that such evidence requiring corroboration cannot be used to corroborate any retracted confession, which also requires corroboration, it is possible to argue that such evidence requiring corroboration cannot be used to corroborate any retracted confession, which also requires corroboration But this would depend on facts and circumstances of a particular case In the decision of the Travancore-Cochin High Court referred to

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1. (1954) Cr L J 895 (1954) K L T. 136 A I R 1954 T C 321
2. (1889) I L R 12 Mad 123.
3. (1900) I.L.R. 27 Cal. 295.
4. I L R (1922) 45 Mad 766 : 43 M L J 222 : A I R 1923 Mad 20 at 23.
5. I L R (1924) 47 Mad 232 · 45 M.L J. 602 . A.I R. 1924 Mad. 379 at 383.

above, there is reference to the observation of Lord Goddard in *Mohammad Sugal Esa* v. *The King*[1], though made in a different context, to the following effect:

> "Once there is admissible evidence a Court can act upon it; corroboration, unless required by statute, goes only to the weight and value of the evidence."

It is pointed out in the Travancore-Cochin decision that section 288, Criminal Procedure Code has come up for consideration before the Privy Council as also before the Supreme Court of India and that though the question as to corroboration did not specifically arise for consideration before those tribunals, there are sufficient indications in their pronouncements that the section does not admit of any limitation. We are, therefore, unable to lay down as proposition of law that a retracted judicial confession cannot, under any circumstances, be corroborated by evidence admitted under section 288, Criminal Procedure Code It would depend upon the facts of each case, whether it would be safe to do so and it is, in this view that we would like to distinguish the decision in *Queen Empress* v. *Bharmappa*[2], already referred to.

In the present case there are several circumstances, which clearly prove the guilt of the appellant beyond reasonable doubt. It should be noted that the appellant, his mother and the deceased were the only inmates of the house, apart from the two children. In fact, the evidence of P Ws 1 and 2 on this aspect has not been cross-examined There is no suggestion that there was any one else in the house There is the conduct of the appellant in appearing in the Police Station with the blood-stained clothes in a bundle and the weapon, which was also blood-stained, though its origin could not be traced on account of disintegration The explanation of the appellant is that he found one Peer Mohammad coming out of his house, but there is no support for this fact even in the evidence of P Ws. 1 and 2, who could have seen Peer Mohammad or any stranger leaving the house, in the morning hours at 7 or 7-30 A M There is also no conceivable reason why Peer Mohammed a boy as stated by the appellant, should have brutally stabbed the appellant's wife The version put forward by the appellant that one Peer Mohammad came out of the house is only a myth There is really no reason to disbelieve the evidence of P Ws 3 to 5 about the extra-judicial confession made by the appellant In fact, it rings true They belong to the community of the appellant and they are residents of the same locality Nothing has been suggested to any of these witnesses to show why they should come forward and depose falsely against the appellant The reason for P Ws 1 and 2 not giving evidence about the incriminating circumstances against the appellant found in their earlier statements is obvious, as P W 2 is his mother and P W 1 is the sister of P W 2 We have no doubt that the version of P W 1 in Exhibit P-2 really represents the truth, as it is consistent with her earlier version in Exhibit P-1. In fact, there is nothing to show that she gave any different version during the investigation in this case We are fully satisfied about the truth of the version in Exhibit P-2 and this by itself is sufficient, along with other circumstantial pieces of evidence, to find the appellant guilty. It could not be said that this evidence and other pieces of circumstantial evidence referred to by us cannot corroborate the retracted extra-judicial confession of the appellant. It is true the learned Advocate for the appellant has made a comment that P W. 1 merely stated, even in her prior statements, that the appellant trampled or put his foot on the neck of the deceased Kathija Bibi There is no indication in the medical evidence to support the statement The death of the deceased was not caused by strangulation but by stabbing Evidently P W 1 went there only at the last stage of the occurrence, when the appellant was still having his leg on the neck of the deceased and having the weapon in his hand This P W. 1 was not a witness of the entire occurrence in this case. She has gone back from what little she had stated in the committal Court, when she came to depose in the Sessions Court. Though the learned Sessions Judge has observed in paragraph 13 of his judgment that the motive for the murder is not clear, it is quite apparent, as already stated,

1. (1945) 2 M L J 493 · A.I R 1946 P C 3 at 4.
2. (1889) I.L.R. 12 Mad 123.

from the suspicion entertained by the appellant about the fidelity of his wife as spoken to by his own mother P W 2 and the letter of divorce sent by him to his father-in-law, P W 10, that the appellant was seriously ill-disposed towards his wife Kathija Bibi. The conviction of the appellant under section 302, Indian Penal Code is fully justified on the evidence in this case The appellant has been given the lesser penalty of imprisonment for life for the reasons mentioned by the learned Sessions Judge in the penultimate paragraph of his judgment Conviction and sentence are confirmed and the appeal is dismissed

V M.K —— *Conviction and sentence confirmed, Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE R SADASIVAM

Public Prosecutor . *Appellant**

v.

Meenakshi Achi and another . *Respondents.*

Prevention of Food Adulteration Act (XXXVII of 1954), *sections* 2 (1) (*a*) (j) (h), 2 (ix) (j), 7 (1), 13 (1) *and* (2) *and* 16 (1) (a) (i) *and rule* 28, *clause A* II. 11 *in Appendix 'B'—Report of the Public Analyst vague—No proof of personal analysis of ice cream by the Director of Central Food Laboratory—Acquittal of the accused, if justified*

The report of the Public Analyst given under section 13 (1) of the Prevention of Food Adulteration Act, is to the effect that the sample of ice cream contained coal-tar dye which is not in the list of dyes permitted to be used upon food The report should contain factual data of the analysis to enable the Court to decide that the article of food is adulterated A vague opinion as to the content of coal-tar-dye found in the report filed in the present case, can hardly be of any assistance to a Court in deciding whether the coal-tar dye used is really not one of the permitted varieties. But it is only in the report of the Director of Central Food Laboratory it is mentioned that the ice cream taken from the accused contained coal-tar dye, which was rose in shade It has not been shown by the prosecution that the analysis was done personally by the Director of Central Food Laboratory as will appear to be necessary from a reading of clause (2) of section 13 of the Act Therefore, the certificate issued by the Director of Central Food Laboratory has to be rejected as defective Even if one falls back upon the report of the Public Analyst, the report cannot assist the prosecution on account of its being vague

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondents (accused) of an offence under section 2 (1) (*a*) (*j*) and 2 (1) (*j*), 7 (1), 16 (1) (*a*) (*i*) read with rule 28, clause A II. 11 in Appendix 'B' to rule 5 by the Additional First-Class Magistrate II, Madurai, in C C No 172 of 1964 on his file

R. Veeramani, for Appellant.

M. Srinivasagopalan, for Respondents

The Court delivered the following

JUDGMENT —State has preferred this appeal against the acquittal of the accused in C C No 172 of 1964 on the file of the Additional First Class Magistrate II, Madurai. The Food Inspector, Madurai Municipality, filed a complaint against the respondents under section 16 (1) (*a*) (*i*) read with 2 (1) (*a*) (*j*) (*h*), 2 (*ix*) (*j*), 7 (1) of the Prevention of Food Adulteration Act, hereinafter called the 'Act' and rule 28, clause A II 11 in Appendix 'B' to rule 5 of the Rules framed under the Act, for having sold ice cream which on analysis was deficient in fat to the extent of 50 per cent. and also contained coal-tar dye which is not of the permitted variety.

* Crl.A. No. 601 of 1965, 15th December, 1967.

P W 1 Narayanan, Food Inspector, Madurai Municipality went to the said ice cream company at about 9-50 A M on 22nd July, 1964, and purchased 600 grams from the second accused on payment of Rs 3 and he adopted the usual procedure of dividing the ice cream into three equal parts, retaining one part with himself, giving one part to the second accused and sending the third to the Public Analyst for analysis. The report of the Public Analyst Exhibit P-7 shows that the sample sent to him is deficient in fat to the extent of 50 per cent and it contains coal tar dye which is not in the list of dyes permitted to be used upon food. During the course of the trial, the sample given by the accused was sent to the Director of Central Food Laboratory and his report Exhibit C-2 also is to the effect that the ice cream is adulterated as the total fat content was only 2 9 per cent and the coal tar dye (rose in shade), which is not permitted, was present. The learned Additional First Class Magistrate acquitted both the accused on the ground that the first accused is the 'technical owner' and that the business was really managed by her husband and that the case against the second accused has not been satisfactorily proved as according to him he is only a clerk in the ice cream company and it is not definitely known who exactly sold the ice cream to P W 1 I may at once state that the reasons given by the learned Additional First Class Magistrate are wrong and this evidently has led the State to file this appeal The learned Additional First Class Magistrate could have given valid reasons for acquitting the accused

The fact that the first accused does not actually manage the business is irrelevant, so long as she is the owner of the company The fact that she left the management of the company in the hands of her husband could be taken into consideration in awarding the sentence So far as the second accused is concerned, it is true that he has adduced the evidence of D W 1, the husband of the first accused, and D W 2, an employee in the company, in support of his case that he has nothing to do with the sale of the ice cream and that he is only an employee in the company But having regard to the receipt Exhibit P-1 signed by the second accused, notice Exhibit P-2 served on the second accused, the acknowledgment Exhibit P-3 signed by the second accused for receipt of the sample and the statement Exhibit P-4 given by the second accused admitting the fact that he sold the ice cream the evidence of P W. 1 ought to have been accepted by the learned Additional First Class Magistrate In fact the learned Magistrate has not referred to any of these documents His finding that the second accused did not sell the ice cream s opposed to the oral and documentary evidence in this case It is not possible to accept the interested testimony given by D W. 1, the husband and D W 2, the employee of the first accused in support of the belated defence of the second accused that he did not sell the ice cream I find that the second accused did sell the ice cream to P W 1

The accused have let in the evidence of D W 3 to prove that the skimmed milk had been purchased from him to make the ice cream Skimmed milk cannot be expected to contain milk fat, though it would contain milk solids In *The Public Prosecutor* v *M Sethuvel Chettiar* etc.[1], preferred by the State against the acquittal of the accused in those cases, Krishnaswamy Reddy, J, has found that the ice cream made of skimmed milk need not contain milk fat, but it should contain not less than 8 5 per cent of milk solids and dismissed the State appeals It is unnecessary to repeat the reasons given in that judgment, as I entirely concur with the same The prosecution has not let in any evidence to show that the accused purported to sell ice cream made of pure and not skimmed milk Hence, the accused could not be convicted for having sold ice cream which did not contain milk fat, as it is the case of the accused that ice cream was made of skimmed milk

The only other ground on which the accused could be found guilty of having sold adulterated food stuff is that the coal tar dye used in the preparation of ice cream is not one of the permitted varieties The report of the Public Analyst is only to the effect that the sample of ice cream contained coal tar dye which is not in the list of dyes permitted to be used upon food It has been repeatedly held in

1. (1968) 2 M L J. 210 : (1968) M.L J. (Cr.) 501.

several decisions that the report of the Public Analyst should contain factual data of the analysis to enable the Court to decide that the article of food is adulterated. A vague opinion as to the content of coal tar dye found in Exhibit P-7, can hardly be of any assistance to a Court in deciding whether the coal tar dye used is really not one of the permitted varieties In (*The New Bharat Confectionary, Sirkali, Petitioner 2nd accused*),[1] I have pointed out that it is the duty of the prosecution, in cases like the present one, where the report does not give details, to examine the Public Analyst to satisfactorily prove to the Court that the coal tar dye used by the accused is not of the permitted variety. That case related to a confectionary in which Public Analyst gave the opinion that the coal tar dye was not of the permitted variety The coal tar dye used in that case was of red colour which is one of the colours permitted to be used under the Rules. The Public Analyst report does not even state the colour of the coal tar dye used in this case. It is only in the report of the Director of Central Food Laboratory it is mentioned that the ice cream contained coal tar dye, which was rose in shade.

The learned Advocate for the accused urged that the report of the Director of Central Food Laboratory does not show that the analysis was done by him and contended that the certificate Exhibit C-2 cannot be used against the accused. I gave more than one adjournment to the Public Prosecutor to ascertain whether every one of the samples sent to the Director of Food Laboratory is personally analysed by him. But the learned Public Prosecutor could not get the information in spite of sending letters and reminders It is highly unlikely that the Director of Central Food Laboratory would have personally analysed every one of the samples sent to him. Under section 13 (1) of the Act, the Public Analyst shall deliver, in such form as may be prescribed, a report to the Food Inspector of the result of the analysis of any articles of food submitted to him for analysis Under Form III as it originally stood, the Public Analysit had to sign the following certificate "I further certify that I have analysed the aforementioned sample, and declare the result of my analysis to be as follows" In a number of cases, argument was advanced that the Public Analyst should himself analyse the sample as would appear to be necessary from the form of the certificate which he had to sign The certificate in Form III has subsequently been amended by stating that the sample "was caused to be analysed" But sub-section (2) of section 13 refers to the certificate of the Director of the Central Food Laboratory At the end of the clause it is stated that the Director of Central Food Laboratory shall send a certificate to the Court in the prescribed form within one month from the date of the receipt of the sample specifying the result of 'his' analysis. In some editions of the Act, the word 'the', is found instead of the word 'his' But in the authorised version of the Act, the word "his" is found The form prescribed under the Rules is not in conformity with this section, as it is only to the effect that the sample has been analysed and the result of the analysis alone is required to be stated Thus, in this case, it has not been shown by the prosecution that the analysis was done personally by the Director of Central Food Laboratory as will appear to be necessary from a reading of the clause (2) of section 13 of the Act.

In *Municipal Corporation, Delhi* v *Jai Dayal*[2], it has been held that it is only when a certificate from the Director of Food Laboratory is treated by Court as final and conclusive evidence of the facts stated therein, the report of the Public Analyst may be considered to have been superseded. It was held in the decision that if the Director's certificate is not considered as final and conclusive evidence of the facts stated therein and is considered to be defective for the purpose of determining the issue of adulteration of the food stuff, then the report of the Public Analyst cannot be considered as superseded The learned Advocate for the accused referred to the decision in *Municipal Corporation of Delhi* v *Ghisa Ram*[3], in support of his contention that a valuable right is conferred on the accused by section 13 (2) of the Act to have the sample given to him analysed by the Director of the Central Food Laboratory

1. C R C No 167 of 1965.
2. A.I.R. 1964 Punj. 520.
3. (1967) M L J (Cr) 746 · (1967) 2 S C J 423 : A.I.R. 1967 S C. 970.

that such a valuable right has been given for the proper defence of the case and that where there is a denial of that right on account of the deliberate conduct of the prosecution, it leads to serious prejudice and it would not be proper to uphold the conviction. But it is clear from the decision that the principle would be applied only to cases where the conduct of the prosecution has resulted in the denial to the accused of an opportunity to exercise his right Even in that decision it was held that the provisions of sections 13 (3) and 5 of the Act are attracted, when in fact, the analysis of the sample sent to the Director of Central Food Laboratory is made by him on the basis of which he issues a certificate and that if for any reason no such certificate is issued, the report given by the Public Analyst does not cease to be evidence of the facts contained in it and does not become ineffective merely because it could have been superseded by the certificate issued by the Director of the Central Food Laboratory. But in this case, the certificate has to be rejected as defective Even if one falls back upon the report of the Public Analyst, that report cannot assist the prosecution on account of its being vague as already pointed out by me

For the foregoing reasons, I see no ground to interfere with the acquittal of the accused though the reasons given by the learned First Class Magistrate for the acquittal are totally irrelevant

The appeal is dismissed

V M K. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE N. KRISHNASWAMY REDDY

Hazarimal L. Shah .. *Appellant**

v

Philips India Ltd, represented by the Regional Manager, Southern Region *Respondent.*

Trade and Merchandise Marks Act (XLIII of 1958), section 79—Offence under—Proof.

So far as the bulbs sold in the present case are concerned, there is no dispute that they contained a false trade mark But the point to be determined is whether the accused comes under any of the sub-clauses of section 79, namely, (*a*) did he take reasonable precautions and had no reason to suspect the genuineness of the trade mark at the time of sale or exposure for sale in his shop ? (2) whether he gave all the information readily and spontaneously on demand by the prosecutor ? and (3) could it be said, in the circumstances of the case, that he acted innocently ?

From the facts in the present case it cannot be said that the accused had no reason to suspect the genuineness of the trade mark or that he acted innocently

Appeal against the Judgment of the Second Presidency Magistrate of the Court of Presidency Magistrate, George Town, Madras, in Case No 18214 of the Calendar for 1964

K N Balasubramanyam, for Appellant

K Ramaswamy, for Respondent

The Assistant Public Prosecutor, for State

The Court delivered the following

JUDGMENT —The appellant Hazarimal L Shah was convicted under section 79 of the Trade and Merchandise Marks Act, 1958 and sentenced to pay a fine of Rs 500, in default to undergo simple imprisonment for a period of three months, by the Second Presidency Magistrate, Madras

The prosecution case is briefly this . Philips India Limited, a registered firm manufacturing and dealing in all varieties of electrical goods under the distinctive

* Crl. A. No. 875 of 1965. 1st March, 1968.

trade mark 'Philips', is the complainant in this case They are manufacturers of electrical lamps of 100W, 60W, 40W and 25W which earned a great reputation in the market They have acquired exclusive right to use the trade mark The complainant had information that some spurious and inferior quality bulbs under the trade mark 'Philips' were being sold in the shop of the appellant at No 129-A, Naimiappa Naicken Street, Madras P W 4, B Venkappa Naick, a Research Investigator of the Madras School of Social Work who usually used to purchase Philips bulbs for lighting his house, went to the shop of the appellant in November, 1964 and purchased four bulbs as per bill Exhibit P-4. He suspected the genuineness of the bulbs as he found some change in the bulbs. When he rubbed at the bottom of the bulbs the trade mark came off He made a complaint Exhibit P-4 to the Philips Company and handed over the bulbs purchased by him along with the bill Exhibit P-4 (*a*), issued by the appellant P W 5, R Govindan, an Advocate also purchased bulbs from the shop of the appellant and they were found to be spurious He also made a complaint to the Philips India Limited P.W 1 Seshadri, Manager, Customers Products Department, Philips India Ltd, described the manner in which the bulbs were packed and trade mark affixed He stated that the bulbs were packed in card board cartons which bore emblems and word 'Philips' and also the picture of a bulb He checked the bulbs produced by P Ws 4 and 5 and found them to be spurious and the marks 'Philips' found there were not genuine He found three eye lids in the spurious bulbs whereas there must be two eye lids in the genuine Philips bulbs The trade mark on the spurious bulbs was easily erasable with the finger nail, but it was not easy in the case of trade mark on genuine bulbs The filament in the genuine bulb will not protrude at either end whereas it protruded on the spurious bulbs The eye lids in the genuine bulbs were neatly circled whereas in spurious bulbs they were irregular P W 1 also came to know that the appellant was living in the house opposite to his shop and was affixing seals on spurious bulbs to make them look like the complainant's bulbs P W 1 further stated that the cartons used by the appellant were also deceptively similar to the genuine cartons, though the trade marks on the false cartons were not neat and clear as on the genuine cartons

On an application by the complainant, a search warrant was issued by the Presidency Magistrate to search the shop and the house of the appellant and P W 3 the Sub-Inspector of Police Elephant Gate Police Station, in pursuance of the warrant, searched the shop in the presence of P W 1 and one N S Krishnamurthy and recovered 141 bulbs of 60W and 80 bulbs of 40W with cartons, bearing the trade marks and emblems of Philips He also recovered from the house of the appellant six bulbs (M O 6 series) without any markings of any trade mark These bulbs on examination by P W 2 the Lighting Engineer in the firm of Philips India Limited, were found to be spurious and that they were being sold under the trade mark 'Philips'.

When examined under section 342, Criminal Procedure Code, the appellant stated that the bulbs produced by P W s 4 and 5 were not sold by him though the bills were his, that he was only a dealer who purchased bulbs in lot cases in the market and sold in retail ignorant of the distinction between genuine and spurious bulbs and that he purchased bulbs without any marks from Tubes suppliers He further stated that he did not notice the differences between genuine and spurious bulbs

There is no dispute that the bulbs which were seized from his shop bearing the trade name 'Philips' were spurious But the defence of the appellant is that he used to purchase them in lot cases and that he had no occasion to note the differences between the genuine and spurious bulbs It can be equally of no doubt that he sold the spurious bulbs with false Philips trade mark to P.W s 4 and 5 though the appellant would deny it There is no reason for P Ws 4 and 5 who are respectable persons to say that they had purchased spurious bulbs from the appellant It is significant to note that they have also produced the bills. There cannot be any

doubt that the appellant was dealing in spurious bulbs under the false trade mark Philips and some of the bulbs, without any mark

The learned Counsel contends that he could not have known, in the circumstances, that what he was selling were spurious and that the prosecution has not established beyond reasonable doubt that the appellant was dealing in spurious bulbs knowing that they contained false trade marks To appreciate the contention of the learned Counsel, it may be necessary to note the relevant section under which the appellant was convicted

Section 79 of the Trade and Merchandise Marks Act, 1958, runs as follows .—

" Any person who sells, or exposes for sale, or has in his possession for sale or for any purpose of trade or manufacture, any goods or things to which any false trade mark or false trade description is applied or which, being required under section 117 to have applied to them an indication of the country or place in which they were made or produced, or the name and address of the manufacturer or the person for whom the goods are manufactured, are without the indication so required, shall, unless he proves,

(*a*) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade mark or trade description or that any offence had been committed in respect of the goods ; and

(*b*) that, on demand by or on behalf of the prosecutor, he gave all the information in his power with respect to the person from whom he obtained such goods or things ; or

(*c*) that otherwise he had acted innocently ; be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.... "

There is a proviso to this clause which may not be necessary to be stated for the purpose of this case.

As already pointed out, so far as the bulbs are concerned, there is no dispute that it contained a false trade mark. But the point to be determined is whether the appellant comes under any one of the sub-clauses of section 79, namely, (*a*) Did the appellant take reasonable precautions and had no reason to suspect the genuineness of the trade mark at the time of sale or exposure for sale in his shop ? (2) Whether he gave all the information readily and spontaneously on demand by the prosecutor ; and (3) Could it be said, in the circumstances of the case, that the appellant acted innocently ?

I do not think from the facts of the case that it can be said that he had no reason to suspect the genuineness of the trade marks or that he acted innocently He is a dealer in electrical goods in large quantities. When he purchased the bulbs from the other shops, it could not be said that he had not taken care to check and verify whether the bulbs purchased by him were used or unused, genuine or not genuine, broken or unbroken and like things similar and if he had taken such care, he must have detected the difference between genuine and spurious bulbs I do not accept for a moment that he had no occasion or scope to verify and check those bulbs. According to the appellant, he purchased them from unauthorised dealers He should have taken more care when, especially he had purchased the bulbs from unauthorised dealers to find out whether he was purchasing genuine Philips bulbs. It cannot be said in those circumstances that the appellant acted innocently in selling or in having been in possession of spurious bulbs. The appellant of course examined defence witnesses on his side besides examining himself as D W. 1. He admitted in cross-examination that he was able to see the difference between a Philips genuine bulb and a spurious bulb

D.W. 2 Ramaswami, Chief Salesman of the appellant, produced counterfoils of the bills issued to P.Ws. 4 and 5. D.W. 3, Sheth, proprietor of Geetha Trading

Company dealing in electrical goods stated that he also purchaed Philips bulbs,, but never used to verify and check regarding the genuineness of those bulbs. D W. 4, Lakshmi Dass B Modi, partner in Modi Electric Corporation would also say that he could not find out the difference between the genuine and spurious bulbs and that he would simply purchase Philips bulbs if it carries the word ' Philips ' on the bulbs. Their evidence is highly artificial as rightly pointed out by the lower Court In the result, I find that the appellant was in possession of the Philips bulbs with false trade mark, that he knew that he was in possession of spurious bulbs and that he sold the same knowing that the bulbs contained a false trade mark. There are no indications in the case that he acted innocently. The conviction by the lower Court is correct and it is, therfore, confirmed. However, taking all the circumstances of the case into consideration, I reduce the sentence of fine to Rs. 100 in default to undergo simple imprisonment for one month. The excess fine (if the fine amount has been collected), will be refunded to the appellant.

The appeal is dismissed with the above modification in the sentence

V.K. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE N. KRISHNASWAMI REDDY.

Doraikannu Padayachi .. *Petitioner**

v

Kaliaperumal Padayachi . *Respondent.*

Criminal Procedure Code (V of 1898), *section* 148 (3)—*Costs under—If can be awarded subsequent to the passing of the original order under section* 145, *Criminal Procedure Code.*

Section 148 (3) of the Criminal Procedure Code does not say that costs must be awarded at the time when the original order is made What it says is that the Magistrate passing a decision under section 145 etc , may direct, by whom costs shall be paid etc There is no emphasis in the clause as regards the time when the order for costs has to be passed There is nothing improper for a Court to award costs even subsequent to the order passed under section 145, Criminal Procedure Code; but such application must be made within reasonable time and it will very much depends upon the discretion of the Courts which must be fairly and judicially exercised.

Thoonga Vadan v. *Perumal Goundan*, (1941) 1 M.L J. 43, dissented from.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to quash the proceedings in C M.P. No 639 of 1967 in M C.No. 58/65 on the file of the Court of the Sub-Divisional Magistrate (Judicial) Ariyalur.

M. Narayanamurthy, for Petitioner.

R. Santhanam, for Respondent.

Calvin Jacob for the Public Prosecutor, for State

The Court made the following

ORDER —This petition has been filed against the order of the Sub-Divisional Magistrate, Ariyalur, awarding costs of Rs 200 to the respondent under section 148 (3), Criminal Procedure Code in Criminal Miscellaneous Petition No. 50 of 1967.

What happened in this case was this · The Sub-Divisional Magistrate, Ariyalur, in M C No. 58 of 1965 passed order on 28th June, 1965, declaring that the respondent herein was in possession of the disputed property. The revision petitioner preferred Cl. R C No. 879 of 1965 against the said order in this Court and the case was remanded for fresh disposal after fresh enquiry. The learned Sub-Divisional

* Crl.M.P. No. 2449 of 1967. 8th March, 1968.

Magistrate, Pudukottai, in M C No. 69 of 1966 who took up the enquiry after the remand again found by his order dated 31st January, 1967, that the respondent herein was in possession of the disputed land.

At the time of delivering the order, he did not award costs.

The respondent, after the order was passed filed an application for costs under section 148 (3), Criminal Procedure Code, and the learned Sub-Divisional Magistrate ordered the revision petitioner on 16th March, 1967, to pay a sum of Rs. 200 to the respondent in Criminal M P No. 50 of 1967 Subsequent to this order, the respondent filed Crl M P No. 639 of 1967 before the Sub-Divisional I First-Class Magistrate, Ariyalur, for recovery of costs awarded in Crl M.P No. 50 of 1967.

The revision petitioner contends that the order passed in Crl M.P No. 50 of 1967 awarding costs subsequent to the original order passed under section 145, Criminal Procedure Code, and the proceedings taken in Crl M P No 639 of 1967, are illegal. It is contended by him that there is no provision in the Criminal Procedure Code to award costs subsequent to the order ; but if costs are awarded, it must be provided in the original order itself. Though there appears to be some force in the contention, on a scrutiny of section 148 (3), Criminal Procedure Code, it appears that there is no prohibition for the Court to award costs even subsequent to the passing of the original order. Section 148 (3), Criminal Procedure Code, runs as follows :

> " When any costs have been incurred by any party to a proceeding under this Chapter the Magistrate passing a decision under section 145, section 146 or section 147 may direct by whom such costs shall be paid, whether by such party or by any other party to the proceeding, and whether in whole or in part or proportion. Such costs may include any expenses incurred in respect of witnesses, and of pleader's fees, which the Court may consider reasonable."

This clause does not say that costs must be awarded at the time when the order is made What it says is that the Magistrate passing a decision under section 145 etc. may direct, by whom costs shall be paid etc. There is no emphasis in the clause as regards the time when the order for costs has to be passed. There is nothing improper for a Court to award costs even subsequent to the order passed under section 145, Criminal Procedure Code, but such application must be made within reasonable time and it will very much depend upon the discretion of the Courts which must of course be fairly and judicially exercised.

In *Vythianada Tambiran* v. *Mayandi Chetty*[1], Subramania Ayyar, J , held as follows: " An award of costs under section 148 (3) of the Code of Criminal Procedure should, in the usual course, be contemporaneous with the decision of the main question. Where, however, circumstances require the postponement of the award of costs, it should be made within a reasonable time after the disposal of the principal subject of the proceeding, in the presence of both parties."

In that case, the order under section 145, Criminal Procedure Code, was passed on 30th June, 1905 and on 3rd July, 1905, the application for costs was made It was held that the application was made within reasonable time. This decision was followed in *Manglu Sahu* v. *Ramdhani Tamboli*[2], it was held in the said decision that the application for costs must be made within a reasonable time. In that case, the order under section 145, Criminal Procedure Code, was passed on 13th October, 1927. The application for costs was made on 4th November, 1927, about three weeks after the original order was passed

Lakshmana Rao, J , in *Nariah* v. *Krishnamurthi*[3], followed the decision in *Vythianada Tambiran* v. *Mayandi Chetty*[1], and held that the award of costs should be either contemporaneous or should be made within a reasonable time after disposal of the case under section 145, Criminal Procedure Code. In that case, the order

1. (1906) I L.R 29 Mad. 373.
2. A.I.R. 1929 Pat. 93.
3. (1938) M.W.N. (Crl) 184.

under section 145, Criminal Procedure Code, was passed on 31st February, 1937 The costs were awarded on 6th January, 1938. Nearly about 10 months later. Lakshmana Rao, J., held that the costs were not awarded within reasonable time. Unfortunately, in a subsequent decision by Lakshmana Rao, J, in *Thoonga Vadan* v *Perumal Goundan*[1], he contradicted himself from his prior decision and stated that when there was no order as to costs in the decision under section 147, Criminal Procedure Code, the award of costs by a subsequent order cannot be supported Neither his earlier decision nor the decision of Subramania Ayyar, J, in *Vythianada Thambiran* v *Mayandi Chetty*[2], was brought to his notice

In *Chandrama Rai* v *Harbans Rai*[3], a Division Bench held that even a successor to the Magistrate who passed a decision under section 145, Criminal Procedure Code, can deal with the matter of costs subsequently I respectfully agree with the decisions in *Vythianada Tambiran* v *Mayandi Chetty*[2], and *Manglu Sahu* v. *Ramdhani Tamboli*[4], and the earlier decision of Lakshmana Rao, J, in *Nariah* v *Krishnamurthi*[5].

In the result, the Criminal Miscellaneous Petition is dismissed

V K —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE N KRISHNASWAMY REDDY.

M. Kuppuswami Chettiar . *Petitioner**

Defence of India Rules—Part XII-A—Gold Control—Rules, 126-*P* (2) *and* (iv) *and* (vi) *and* 126-*P* (2) (ii)*—Interpretation—Meaning of "acquire"—Petitioner in possession of contraband gold as a carrier but convicted for acquiring contraband gold-Conviction, if sustainable*

"Acquire" means, to have gain or to get interest in the property A carrier of goods for hire cannot be said to acquire interest in the property which he carries It is true, a carrier is in possession of the property while he carries but without any interest in the property In contra-distinction to the language used in rule 126-P (2) (*iv*), rule 126-P (2) (*ii*) of the Gold Control Order creates a separate offence for mere possession of any quantity of gold in contravention of rule 126-I (10) The petitioner had not been convicted under this rule Therefore, it has to be held that the petitioner was only a carrier and as a carrier, he was in possession of the contraband gold He has not acquired the gold, in the sense that he has acquired any interest in it The conviction and sentence under rule 125-P (2), and (*iv*) and (*vi*) of Part XII-A, Gold Control Order, had to be set aside

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Chief Presidency Magistrate, Madras, passed on 17th August, 1966 in C.C No 13646 of 1966.

K P. Jagadesan, for Petitioner.

The Assistant Public Prosecutor, for State.

The Court made the following

ORDER —The revision petitioner Kuppuswamy Chettiar, was convicted under section 135 (*b*) (ii) of the Customs Act and rule 126-P (2) and (iv) and (vi) of Part XII-A Gold Control—Chapter VI of the Defence of India Rules, 1962 read with rule 126-H (2) (*d*) of the said Rules and was sentenced to simple imprisonment for six months under each count, the sentences to run concurrently and also to pay a fine of Rs 200 under the second count, in default to undergo simple imprisonment for one month, by the Chief Presidency Magistrate, Madras

1 (1941) M W N 63 (1941) 1 M L J 43
2. (1906) I L R 29 Mad. 373.
3. A I R 1965 Pat. 21.
4 A I R. 1929 Pat 93.
5. (1938) M W.N. (Crl) 184

* Crl R C. No 1094 of 1966.
Crl.R.P. No. 1074 of 1966. 4th April, 1968.

The Assistant Collector of Central Excise, Madras, filed a complaint against the revision petitioner under section 135 (*b*) (ii) of the Customs Act, 1962 read with 111 and 112 of the said Act and rule 126-P (2) and (*iv*) of the Defence of India Rules, 1962 After the preliminary enquiry, the learned Chief Presidency Magistrate framed charges under section 135 (*b*) (ii) of the Customs Act and rule 126-P (2) (*ii*) and (*iv*) of Part XII-A, Gold Control—Chapter VI of the Defence of India Rules, read with rule 126-H (2) (*d*) of the said Rules. The learned Chief Presidency Magistrate has not recorded any finding in respect of the charge under rule 126-P (2) (*ii*) of the Gold Control Rules

The facts of the prosecution case are briefly these. The revision petitioner who is a native of Karaikudi, Ramnad District, alighted from the Raichur-Madras passenger at the Madras Central Station at about 5-45 P.M on 15th September, 1965. On suspicion, P W 1, the Inspector of Central Excise intercepted the petitioner and took him to the room of the Assistant Station Master. The petitioner was found to be in possession of a cloth bag. But nothing incriminating was found in the cloth bag The person of the petitioner was searched and while untying his dhoti, P.W 1 found a cloth pouch tied around his waist. P.W 1 seized the cloth pouch in the presence of P.W 2, the Deputy Superintendent of Central Excise. The pouch contained small compartments, in which there were 12 bits of gold bars with foreign markings, weighing 120 tolas and 20 gold sovereigns. The loin cloth '*kowbeenam*' worn by the petitioner was also searched and it contained three gold sovereigns wrapped in a paper and tied in the loin cloth. They were seized under mahazar Exhibit P-1. Two railway tickets were also seized from the petitioner and one of those tickets was a reserved ticket from Bombay to Madras. The petitioner was thereafter taken to the Customs Office where he gave a statement Exhibit P-2. The petitioner stated that he went to Bombay at the instance of one Mani and brought 12 bits of gold and 20 gold sovereigns from Bombay by concealing them on his person, that he purchased three gold sovereigns for his own use for Rs. 315 and that he had them concealed in the '*kowbeenam*'

A show cause notice Exhibit P-3 under the Customs Act and another show cause notice Exhibit P-4 under Gold Control Order were served on the petitioner. The petitioner sent a reply to the show cause notices under Exhibit P-5 confessing his guilt and also stating that he had nothing more to add to what he had already stated in his statement under Exhibit P-2. He also pleaded that as he was the first offender, he might be dealt with leniently. The Collector of Customs ordered the confiscation of the contraband gold

The case of the petitioner before the lower Court as disclosed in his statement under section 342, Criminal Procedure Code, was that he visited his relative's house at Renigunta and that while he was at Renigunta Railway Station, one Sait met him and took him to the waiting room and told him that if he could carry some articles to Madras, he would be paid Rs. 150 to Rs 200. His further case was that the said Sait tied some cloth pouch in his waist saying that it was a pledged article and asking him to deliver the same to him at Arkonam or Central Station. The petitioner admitted the seizure of the gold from his person, but he would say that he was not aware of the contents of the cloth pouch

So far as the conviction under section 136 (*b*) (ii) of the Customs Act is concerned, there cannot be any difficulty in sustaining the same in view of the overwhelming evidence against the petitioner and admissions made by him. The learned Counsel for the petitioner is unable to challenge the conviction under the said section As already noted, it was admitted by the petitioner that gold was seized. It bore foreign markings. There is little doubt that the gold had been imported into India from a place outside India and the gold is liable to be confiscated under section 111 (*d*) of the Customs Act Under section 123 (1) of the said Act, if any goods were seized by the officers in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized. The petitioner has not

discharged that burden. He has admitted in Exhibits P-2 and P-5 that he was carrying the gold at the instance of a third party It is difficult to believe the case of the petitioner, set up by him in his statement under section 342, Criminal Procedure Code, that he did not have knowledge about the gold It was in a cloth pouch. He tied it to his waist. He must have necessarily known as to what the pouch contained Therefore, the conviction under section 135 (*b*) (ii) is confirmed

The learned Counsel for the revision petitioner strenuously contended that the conviction under section 126-P (2) (*ii*) and (*iv*) read with rule 126 H (2) (*d*) of the Gold Control Order cannot be sustained as it cannot be said under any stretch of imagination that by having been in possession of gold as carrier the petitioner acquired it within the mischief of rule 126-H (2) (*d*) and 126-P (2) (*ii*) and (*iv*). There appears to be force in the contention of the learned Counsel It is, therefore, necessary to note the relevant provisions of the Gold Control Rules. Rule 126-H (2) (*d*) is as follows:

"Save as otherwise provided in this Part............................

(*d*) no person other than a dealer licensed under this Part shall pay or otherwise acquire or agree to buy or otherwise acquire, gold, not being ornament, except,

(i) by succession, intestate or testamentary, or

(ii) in accordance with the permission granted by the Board in this behalf:

Provided that a refiner may buy or accept gold from a dealer licensed under this Part."

Rule 126-P (2) (*iv*) makes the contravention of the rule 126-H (2) (*d*), an offence punishable under (*vi*) of the same rule which is as follows.—

"(*vi*) whoever buys, or otherwise acquires, or accepts gold in contravention of any provision of this Part,......................shall be punishable with imprisonment for a term of not less than six months, and not more than two years and also with fine."

It is material to note that a minimum sentence is provided for the offence under this rule whereas no such minimum sentence is provided under section 135 (*b*) (ii) of the Customs Act From these provisions, it is contended by the learned Counsel for the petitioner that the petitioner by carrying the gold as a carrier, as admitted by him in Exhibits P-2 and P-5 and even in his statement under section 342, Criminal Procedure Code, it cannot be said that he acquired the gold as a carrier. He further contended that mere possession of gold cannot be equated with acquisition To acquire, according to the learned Counsel, is to get some interest in the property in contradistinction with possession where a person can possess even without acquiring interest in the property, for instance, the possession by carrier who carries for hire.

According to the Oxford English Dictionary, the word 'acquire' means, to gain or get as one's own (by one's own exertions or qualities) According to Ramanatha Iyer's Law Lexicon, the word 'acquire' means, to become the owner of property, to make property one's own.

"Acquire" means, to have gain or to get interest in the property A carrier of goods for hire cannot be said to acquire interest in the property which he carries. It is true, a carrier is in possession of the property while he carries but without any interest in the property. It is very significant to note that in contradistinction to the language used in rule 126-P (2) (*vi*), rule 126-P (2) (*ii*) creates a separate offence for mere possession of any quantity of gold in contravention of rule 126-I (10). Rule 126-P (2) (*ii*) is as follows —

"Whoever has in his possession or under his control any quantity of gold in contravention of any provision of this part shall be punishable. ... ."

If the petitioner had been convicted under this rule the conviction would have been perfectly justified. I, therefore, hold that the petitioner was only a carrier

and as carrier, he was in possession of the contraband He has not acquired the gold, in the sense that he has acquired any interest in it The conviction and sentence under section 126-P (2) and (*iv*) and (*vi*) are set aside and the petitioner is acquitted of that offence, and the fine amount, if paid, will be refunded to him The conviction under section 135 (*b*) (ii) is confirmed There is no minimum sentence for this offence. It appears that the petitioner had been in jail for a short term. The gold was confiscated Taking these circumstances, I reduce his sentence of imprisonment to the period already undergone, but instead, I impose a fine of Rs 250 in default to undergo simple imprisonment for two months.

The revision petition is dismissed with the modification mentioned above.

V.M K —— *Revision Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE N KRISHNASWAMY REDDY.

Public Prosecutor .. *Appellant**

v.

Thangavelu Pillai .. *Respondent.*

Prevention of Food Adulteration Act (XXXVII of 1954), *section* 16 (1) (*a*) (ii)—*Offence of selling adulterated ghee—Ingredients—Delay in analysis—Effect—Burden of proof—Report of analyst submitted after* 2 *months—Date of analysis not mentioned—Conviction unsafe.*

The fact that the sample of ghee was sold by the accused and that it contained 37 per cent fat (not derived from milk or cream) would be sufficient to bring home the guilt against the accused in respect of the offence of selling adulterated ghee.

It would not be correct to say that when there is a delay in analysis, the prosecution should establish that the delay had no relation to the causing of adulteration in the sample. But when in the report of the analyst submitted after two months after the receipt of sample by him, it is not mentioned as to when the analysis was made, it would not be safe to hold that even at the time the sample was purchased it must have been adulterated

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) of offences under section 16 (1) (*a*) (ii) of the Prevention of Food Adulteration Act, by the Sessions Judge, East Thanjavur Division at Nagapattinam in C A. No 74 of 1965 on his file dated 23rd November, 1965 (C C. No. 174 of 1965 on the file of the Court of the Additional First Class Magistrate, Mayuram).

The Assistant Public Prosecutor, for Appellant.

K. S. Naidu and *R Vijayan*, for Respondent.

The Court delivered the following

JUDGMENT —This appeal has been preferred by the Public Prosecutor against the order of acquittal by the Sessions Judge, Nagapattinam, in C A No. 74 of 1965, reversing the conviction and sentence of the respondent passed by the Additional First Class Magistrate, Mayuram, in C C. No. 174 of 1965, under section 16 (1) (*a*) (ii) of the Prevention of Food Adulteration Act.

The prosecution case is briefly this: The respondent Thangavelu Pillai was a ghee merchant at Sirkali P.W. 1 Ellappan purchased sample of ghee from the respondent for analysis and after observing the formalities, he divided the ghee purchased by him into three parts and put them in three bottles He gave one to the respondent, retained the other with him and sent the third to the analyst. This was on 29th April, 1965. The Public Analyst received the sample sent by P W. 1

*Crl.A. No. 235 of 1966. 25th June, 1968.

on 30th April, 1965, and submitted a report signed by him on 2nd July, 1965. He found on analysis that the sample of ghee contained 37 per cent of fat and that the fat was not derived from milk or cream. The respondent pleaded guilty to the charge. He happened to be a second offender and he was convicted and sentenced to undergo simple imprisonment for three months and to pay a fine of Rs. 200. The learned Magistrate took a lenient view by not providing the minimum sentence for his second conviction as the respondent happened to be an old man. Against the conviction and sentence, the respondent preferred an appeal. The learned Sessions Judge acquitted the respondent on the grounds that the plea of guilty could not be accepted as the ingredients of the offence were not made out, that there was inordinate delay in analysing the ghee and that the increase of fat in the ghee might be due to exposure and other circumstances. He relied upon a decision of this Court in *Mohammed Sheriff Sahib* v. *State*[1], that the prosecution should establish, in case where there was a delay in analysis, that such delay had no relation to incriminating excess percentage of the fatty content of the oil. I am unable to agree with the reasons given by the Sessions Judge in acquitting the respondent.

On the first point that the ingredients of the offence were not proved, there is absolutely no basis for the learned Sessions Judge to come to that conclusion. The fact that the sample has been sold by the respondent and that it contained 37 per cent fat would be sufficient to bring home the guilt against him in respect of the offence with which he was charged. In regard to the second point, it is unfortunate that the decision of the Division Bench reported in *Chandran* v. *State*[2], overruling the decision in *Mohammed Sheriff Sahib* v. *State*[1], was not brought to the notice of the learned Sessions Judge. It is stated by the Division Bench that it will always be open to an accused in any particular case to show that the packing was inadequate or that it was so defective that it could not have prevented air and light affecting the sample oil contained in the bottle and further stated that each case will have to be decided upon its own facts and no rigid rules can be laid down concerning the appreciation of the technical evidence.

However, I am not inclined to interfere with the order of acquittal in this case. Unfortunately, in the report of the analyst, it is not mentioned as to when the analysis was made. The sample was received on 30th April, 1965. Till the report was sent by the analyst, namely, 2nd July, 1965, it was not known as to when the bottle was opened and when it was analysed. In the absence of any material as to when actually the ghee was analysed, it would not be safe to hold that even at the time when the ghee was purchased, it must have been adulterated. It is possible in those circumstances that certain intervening causes might have occurred. In any event, the conclusion of the learned Sessions Judge cannot be said to be incorrect.

In the result, the appeal is dismissed.

V. K. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE N. KRISHNASWAMY REDDY.

Sekharan .. *Petitioner**

Criminal Procedure Code (V of 1898), sections 226 and 227—Charges framed by the committal Court—Power of Sessions Court to add to or alter, before commencement of trial.

A Sessions Judge is not bound by the charges framed in the committal Court. If it is brought to his notice that the charges are erroneously framed not warranted

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1. (1961) M.W.N. 712 : (1961) M.W.N. (Crl.) 195.
2. (1964) M.W.N. (Crl.) 156.

*Crl. R.C. No. 146 of 1968.
Crl. R.P. No. 144 of 1968. 26th February, 1968.

by the facts of the case or the charges are imperfect, the Sessions Judge could satisfy himself, from the records and other materials available, whether there is a case for altering or adding to the charge However, it is clear from sections 226 and 227 of the Code of Criminal Procedure that a Sessions Judge cannot altogether omit a charge which has been framed by the committal Court The Sessions Judge in such a case must proceed with the charge and ultimately may acquit if the charge could not be sustained. But there cannot be any objection at all on the same set of facts to alter the charge under section 307, Indian Penal Code, to an allied charge or to an inferior charge, if the records warrant it It will not amount to an omission

Keshavlal v *Prabodhchandra*[5], 1964 (2) Cr L J. 87, not followed

Petition under sections 435 and 439 of the Code of Criminal Procedure ,1898, praying the High Court to revise the order of the Court of the Second Additional Sessions Judge, Madras Division, Madras, dated 6th February, 1968, and made in Crl M P. No. 34 of 1968 in S C No. 13 of 1967

P. N George, for Petitioner.

The Assistant Public Prosecutor, for State.

The Court made the following

ORDER —The point that arises in this revision petition is whether a Sessions Judge has got power to alter or add to the charge framed by the committal Court before the commencement of the trial.

What the petitioner did in this case was, he filed an application before the Additional Sessions Judge, Madras, requesting him to alter a charge under section 307, Indian Penal Code, under which the committal was made, to one under section 326, Indian Penal Code. The learned Additional Sessions Judge held that he had no jurisdiction to drop a charge under section 307, Indian Penal Code, and frame a charge under section 326 instead He cited a case in *Keshavlal* v *Prabodhchandra*[1], and also a decision of the Supreme Court in *Banwari* v. *State of U P*[2] As far as I could see there is no reference to either section 226 or section 227, Criminal Procedure Code, in the Supreme Court decision. In the earlier decision a single Judge of the Orissa High Court held that altering a charge under section 307, Indian Penal Code, to one under section 324, Indian Penal Code, would amount to quashing of the earlier charge and that that could be done only by a High Court under section 561, Criminal Procedure Code, and that a Sessions Judge, before the commencement of the trial, could not alter the charge. With great respect I am unable to agree with the wide observations made by the learned Judge of the Orissa High Court Section 226, Criminal Procedure Code, reads thus.

> " When any person is committed for trial without a charge, or with an imperfect or erroneous charge, the Court, or, in the case of a High Court, the Clerk of the State may frame a charge or add to or otherwise alter the charge, as the case may be, having regard to the rules contained in this Code as to the form of charges."

Section 227, Criminal Procedure Code, is as follows :—

> " (1) Any Court may alter or add to any charge at any time before judgment is pronounced or in the case of trials by Jury before the Court of Sessions or High Court, before the verdict of the jury is returned................"

In either of these sections there is no basis for making a discrimination between the charges framed before the commencement of the trial and after the commencement of the trial. The charges are normally framed by the Sessions Court before the trial begins If it is brought to the notice of the Sessions Court that the charges are erroneously framed not warranted by the facts of the case or the charges are imperfect, the Sessions Judge could satisfy himself, in those circumstances, from the records and

1. (1964) 2 Cr.L J. 87.
2. A I R 1962 S.C 1198 at 1201

other materials available, whether there is a case for altering or adding to the charge. It is very clear from both the provisions mentioned above that a Sessions Judge cannot altogether omit a charge which has been framed by the committal Court and on which the trial has to take place The Sessions Judge in such a case must proceed with the charge and ultimately may acquit if the charge could not be sustained. There cannot be any objection at all on the same set of facts to alter the charge under section 307 to an allied charge or to an inferior charge, if the records warrant any such alteration. It will not amount to an omission.

A Division Bench of this Court in In re, *Subburathnam*[1], in dealing with the scope of sections 226 and 227, Criminal Procedure Code, observed in the following words with which I am bound and respectfully agree :

> " A trial Judge at Sessions is not bound by the charges framed in the committing Court and he has ample power to revise and alter them not only at the commencement of the trial under section 226, Criminal Procedure Code, but under section 227, Criminal Procedure Code, at any stage of the trial before the verdict of the jury is returned or the opinions of the assessors are recorded "

The petition is allowed The learned Sessions Judge may consider, if necessary, bearing in his mind the principles laid down in this order, whether there is any necessity to alter the charge under section 307 to one under section 326, Indian Penal Code The petitioner is permitted to file a fresh application and adduce any evidence if he thinks fit in support of the application

V.K. ——— *Petition allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE N. KRISHNASWAMY REDDY.

Ramaswami Gounder .. *Accused**

Criminal Procedure Code (V of 1898), *section* 549—*Person subject to Indian Army Act—Conviction and sentence—Magistrate not knowing the accused to be a serving sepoy—Procedure followed by the Magistrate, if liable to be quashed*

Section 549 (1) of the Code of Criminal Procedure has to be understood that when a person is brought before the Court, the Magistrate should have known that he is brought as a person subject to the provisions of the Indian Army Act Without the information of that nature, it would be impossible for the Magistrate to follow the procedure under section 549 If there is no material for the Magistrate to know that he was a serving sepoy subject to the provisions of the Army Act, it cannot be said that the procedure followed by him is wrong It would be unfair to quash the proceedings and allow the accused to be tried by the Court-Martial, in view of the fact that he had served the full term of imprisonment.

Case referred for the orders of the High Court under section 439 of the Criminal Procedure Code, 1898, by the District Magistrate (J.), Tiruchirapalli in his letter, dated 3rd May, 1966 in R C No. A-21224/65 (Crl R C No. 8/66) (C C. No. 1854/65 on the file of the Court of the Sub-Magistrate (J), Karur.

Accused not represented.

The Assistant Public Prosecutor, for State.

The Court made the following

ORDER —This reference is submitted by the District Magistrate (J), Tiruchirapalli, under section 439 of the Code of Criminal Procedure One Ramaswami Gounder was arrested by Velayudhampalayam Police under section 4-A of the Madras Prohibition Act on 22nd July, 1965 The charge-sheet against

1. (1949) 1 M L J 152 : A I R 1949 Mad. 663.

* Crl R.C No. 700 of 1966
Case Referred No 7 of 1966. 26th June, 1968

the said Ramaswami Gounder was filed on 23rd July, 1965, before the Sub-Magistrate, Karur. The Sub-Magistrate remanded the accused and on the adjourned date, the accused admitted the offence. The Sub-Magistrate therefore convicted and sentenced him to suffer rigorous imprisonment for six weeks It is stated that the accused has undergone the full term of imprisonment. It appears that after he was convicted, the said Ramaswami Gounder sent a telegram to the Military Authorities on 25th July, 1965, as he was a soldier during the relevant period The Military authorities addressed the Sub-Magistrate, Karur, on 17th December, 1965, about the irregularity in the procedure followed by him in trying the accused who was subject to the provisions of the Indian Army Act. The Sub-Magistrate sent a report to the District Magistrate (J), Tiruchirapalli, stating that neither the accused nor the police brought to his notice that the accused was a serving sepoy and therefore it was not possible for him to follow the procedure laid down in rule IV of the Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1952. The learned District Magistrate referred this matter to this Court as he felt that the procedure followed by the Sub-Magistrate was not according to law.

It now transpires from the letter addressed by the Military Authorities that the accused was a serving sepoy during the time of his arrest and conviction, and he would be subject to the provisions of the Indian Army Act. An offence similar to that of section 4-A of the Prohibition Act by a sepoy can be tried and punished by a Court-Martial and under section 549 of the Code of Criminal Procedure, it is obligatory on the part of the Magistrate, when a person subject to Military, Naval or Air Force law, is brought before him, charged with an offence for which he is liable to be tried either by a Court to which the Code of Criminal Procedure applies or by a Court-Martial, to have regard to the rules framed under section 549 (1) and deliver such person to the Commanding Officer of the regiment, corps or detachment to which he belongs for the purpose of being tried by the Court-Martial. It is true that the accused is a serving sepoy and should have been delivered by the Magistrate to the Court-Martial according to the provisions and the rules framed thereunder But, in this case, as stated by the learned Sub-Magistrate, none brought to his notice that the accused was a sepoy at the time of the trial or conviction. Section 549 (1) has to be understood that when a person is brought before the Court, the Magistrate should have known that he is brought as a person subject to the provisions of the Army Act. Without the information of that nature, it would be impossible for the Magistrate to follow the procedure under section 549 Then the whole question turns on the point whether the person brought before the Magistrate is a person subject to the provisions of the Indian Army Act. If there is no material for the Magistrate to know that he was a serving sepoy subject to the provisions of the Army Act, it cannot be said that the procedure followed by him is wrong. Whatever the position may be, taking the facts of the present case, it would be unfair to quash the proceedings and allow the accused to be tried by the Court-Martial, in view of the fact that he had served the full term of imprisonment.

The reference is ordered accordingly.

V. M. K. *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Chief Justice* AND MR. JUSTICE M. NATESAN.

The State of Madras represented by the Collector of Madras .. *Appellant**

v.

M. Balakrishna Mudaliar .. *Respondent.*

Land Acquisition Act (I of 1894), sections 4 (1) and 18—Basis of the determination of compensation—Capitalisation of the annual rental value—Proper valuation by taking the true rental value prevailing at the time of section 4 (1) notification.

On the question as to how to arrive at the correct figure for capitalising the annual value, since that was known, held that the proper valuation could be arrived at by taking the true rental value that should have prevailed at the time of the section 4 (1) notification and multiplying it by the proper figure of capitalisation. In the present case the net annual value should be properly multiplied by 18 and not by 24 because the building was quite an ancient one even on the date of the section 4 (1) notification.

Appeal under clause 15 of the Letters Patent against the decree and judgment of Venkatadri, J., dated the 4th December, 1963, and passed in Appeal No. 267 of 1961 and memorandum of cross objections thereto preferred against the decree of the Second Assistant Judge, City Civil Court, Madras, dated 22nd November, 1960, and passed in Land Acquisition Case No. 61 of 1960.

The Additional Government Pleader (*V. Ramaswami*), for Appellant.

R. Desikachari, Joseph Ignatius and *S. Krishna Rao,* for Respondent.

The Judgment of the Court was delivered by

Anantanarayanan, C.J.—The appeal is by the Government, from the Judgment of Venkatadri, J., in Appeal Suit No. 267 of 1961, which related to a short matter of the proper valuation of an extent of 1,591 square feet bearing Door No. 2/31, Xavier Street, Madras City, acquired under the Land Acquisition Act. Admittedly the Land Acquisition Officer awarded a total compensation of Rs. 5,378·90 P. for the value of the land and the building (small tiled house) situate thereon, including the 15 per cent. solatium.

There was a reference under section 18 of the Land Acquisition Act, and, upon this reference the learned Second Assistant Judge, City Civil Court, increased the compensation to Rs. 6,750. Appeals were preferred, both by the claimant and by the State, from this judgment and decree, and the matter came up before our learned brother (Venkatadri, J.) with reference to the proper basis of the determination of compensation, where small areas of this kind, situate in the city, are acquired under powers of eminent domain.

It may be convenient, at the outset itself, to refer to the basis of valuation respectively adopted in the award, and, by the learned Judge of the City Civil Court, in appeal. The award officer observed that the building was admittedly fetching a rent of Rs. 30 per mensem to the owner, and, taking the annual income computed thereon, he deducted quit rent municipal taxes and charges for maintenance, and arrived at the net annual income at Rs. 259·85. He then stated that the manager, Reserve Bank of India, specified the market quotation in respect of the Government of India 3 per cent. conversion loan 1986, as on 29th January, 1958 to be Rs. 71 in respect of paper, bearing the *ex facie* value of Rs. 100. The award officer thus divided Rs. 71 by the rate of interest (three per cent.) and arrived at a figure of 23·6 rounded off to 24, as representing the proper figure for multiplication, in order to capitalise the value. Ultimately, he awarded the total compensation, earlier referred to, after making allowance for the considerable age of the building and, in consequence, capitalising the annual value at eighteen years purchase.

* L.P.A. No. 67 of 1964. 12th December, 1966.

The learned Judge of the City Civil Court apparently felt that this was not a proper method, in the circumstances of this case He thought that the proper valuation could be arrived at by adopting the basis of the cost of construction The property was purchased by the claimant in 1945 for a sum of Rs 4,500 and the claimant had improved it at a cost of Rs 1,050 The learned Judge made allowance for a rise of about 50 per cent in the value of real property, during the 13 years that had elapsed after the purchase He thus arrived at the proper compensation as Rs 6,750 and determined it accordingly

When the matter came up before the learned Judge (Venkatadri, J) the learned Judge pointed out that the true question was, how to arrive at the correct figure for capitalising the annual rental value, since that was known On this aspect, the learned Judge referred to the decision of the division Bench in *Radhakrishna* v *Province of Madras*[1], We certainly agree that this decision, which reviews the prior case-law of this Court on this aspect, may be taken as enunciating completely the principles that should be applied to a situation of this kind

The learned Judge first referred to the decision in *Collector of Kistna* v. *Zamindar of Challapalli*[2] He pointed out that Venkatasubba Rao, J , has observed in this decision that the adoption of the arbitrary rule of capitalisation at twenty years' purchase, would not be justified, where there is definite evidence about the actual return upon secured money investment, or gilt-edged security When that return was 3½ per cent. the figure should be arrived at by dividing 100 by the figure of the return, which would, therefore, permit the value to be multiplied by the figure 30 or thereabouts. In *Land Acquisition Officer, Calicut* v *Subba Rao*[3], another division Bench of this Court, followed the principles in *Collector of Kistna* v *Zamindar of Challapalli*[2], and laid it down as an authorised practice of the Courts, to calculate the profits from any form of landed property as equal to the profits made by investing money in guilt-edged securities The further case-law need not be reviewed here, as, after noting the vicissitudes of the case law, the division Bench in *Radhakrishna* v *Province of Madras*[1] finally observed that the number of years purchase could be properly arrived at, by taking into account the interest yielded by Government securities at the time of the notification under section 4 (1) of the Act. In that particular case, the figure adopted was 331/3

Venkatadri, J , referred to these cases and also to a decision of Subrahmanyam, J , in *State of Madras* v *Mohammed Ibrahim*[4] Finally the learned Judge took the figure of 3 per cent, and dividing 100 by this figure arrived at the figure for capitalisation as 33 1/3 He thought that the Land Acquisition Officer was wrong in adopting the figure for capitalisation at 18 years

We agree with the main argument of the learned Additional Government Pleader that the method adopted by our learned brother (Venkatadri, J) overlooks one vital consideration Certainly, the figure for capitalisation could well be adopted at the figure resulting from the division of 100 by the figure of investment return on secured investment, at the date of the section 4 (1) notification But this is not three per cent. and this is very clear from the notification of the manager of the Reserve Bank of India, which is the sole material on record on this aspect. When the manager pointed out that paper bearing the *ex facie* value of Rs 100 relating to the Government of India three per cent. Conversion Loan, 1986 was quoted at Rs 71 in the market, what was really implied by this, was that the true figure for the return on contemporaneously issued guilt-edged securities had gone up at the relevant date (29th January, 1958) and was no longer three per cent, Actually, the learned Additional Government Pleader has furnished a table of calculation to Court, and, this shows that the current figure should be 4 28 per cent. or thereabouts If 100 is

1. (1948) 2 M L J 159 I L R (1949) Mad 497
2 (1937) 2 M L J 744 I L R (1938) Mad 431
3 (1941) 2 M L J 75.
4 (1960) 1 M L J. 323 : I L R. (1960) Mad. 369

divided by this figure, it comes to an approximate figure of 24 years' purchase as the proper figure for capitalisation

The economic principle behind this can be very simply illustrated At a time when the rate of return on secured investment is low (three per cent.) we may safely assume that it is a period of depression, and of deflationary tendencies Hence the rent or income on house property will also be low, during such period and it is only fair that the value should be arrived at by dividing 100 by the low return figure, thus establishing the high figure of 33, as the figure for capitalisation But, when the rate of interest goes up, rents also will increase, and this may be assumed as axiomatic During such a period, if the rate of interest gives a low figure for capitalisation, on the contrary, the rentals would have necessarily increased and thus the owner is equally secured a just compensation for the value of his property.

In the present case, therefore, we think we may well arrive at the proper valuation by taking the true rental value that should have prevailed, at the time of the section 4 (1) notification, and multiplying it by the proper figure for capitalisation But, we are unable to agree that the true rental value can only be determined at Rs 30 per mensem. No doubt, that was the rent prevailing under the contractual tenancy. But it has to be noted that the contractual tenancy bcame a statutory tenancy, by virtue of the provisions successive Rent Control Acts The result was that, with regard to a building which had been purchased and rented from a period several years antecedent, the Rent Control Act inhibited the owner from deriving rent which he should have obtained easily, had he been able to secure the release of the property from the provisions of the Act.

Since the rent of Rs 30 seems to have prevailed from 1945 onwards, perhaps even earlier, and, we are concerned with the year 1958, by which time both real property values and rental values registered a sharp increase, we think that the figure of Rs 45 per mensem could well be taken as the reasonable and proper rental figure. Calculated on this basis, and making the usual deduction, we arrive at a net annual income of Rs 387 We ought to multiply this by 24, if we were merely adopting the formula without a modification But, we are here dealing with a building that was already sixty years old, and the further life of which must certainly be considered restricted by the age of the building We must make it clear that the principle and the formula referred to in the previous decisions are certainly authoritative, and should be applied to a case of captitalisation ; but that this does not imply that special modification may not be made by Court, resulting from the particular facts of the case before the Court. In the present case, we are of the view that the net annual value that we have arrived at, should be properly multiplied by 18 and not by 24 because the building was quite an ancient one even on the date of the section 4 (1) notification Thus, we arrive at the total figure of Rs 6,966 as the proper compensation, and, we award this amount with 15 per cent solatium thereon and the statutory interest.

The appeal is partly allowed accordingly. Both parties will have proportionate costs.

V.M.K. *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE T VENKATADRI.

M/s. P. N. P. Thulkarunai & Co, Madras, by its Partner P. N. P. T. Gulam Kader . *Petitioner**

v.

The Director, Enforcement Directorate, Ministry of Finance, Reserve Bank Building, New Delhi .. *Respondent.*

Partnership—Sole proprietary concern of a father—Inherited by the sons who formed the partnership—Transactions of the deceased father constituting a statutory crime—Sons not having taken part in the proprietary business of the father—No knowledge of such transactions—If liable to statutory penalties—Vicarious liability.

Foreign Exchange Regulation Act (VII of 1947), *sections* 5 (1), 23 (1) *and* 23 (*C*).

The partners of the partnership firm are brothers. They inherited the business of their father on his death and formed the partnership in April, 1959 Prior to that the petitioner company known as T. & Co was the sole proprietorship concern of the father. Some of the business transactions of the deceased father (as seen from the documents seized on a search made under section 19 of the Foreign Exchange Regulation Act, 1947) had contravened the provisions of section 5 (1) (*d*) of the Act.

The partners though heirs of this deceased and took over all the assets and liabilities of the sole proprietorship concern of their father had not taken any interest in that concern prior to the death of the father, nor is it the case of the Department that they had any knowledge of the contravention of the provisions of the Act. Still the Enforcement Directorate imposed a penalty on the partnership for the said contravention under section 23 (1) (*a*) of the Act.

The partnership by a partner filed a writ petition challenging the levy.

Held: Under section 23-C of the Foreign Exchange Regulation Act (VII of 1947), if a company commits a contravention of the provisions thereof, every person who was at the time of contravention in charge of and was responsible for the conduct of business of the company shall be deemed guilty of such contravention.

There is no provision in the Act that for contravention of the provisions of the Act (VII of 1947) by a person his legal representatives would be vicariously liable for the same.

The doctrine of vicarious liability is not of general application in the field of statutory crimes. It is a matter of construction in each case. Regard must be had to the object of the statute, words used, the nature of the duty and the person on whom imposed, the person by whom it would in circumstances be performed and the person upon whom the penalty is imposed.

By merely stating that the petitioner company is a family concern the Department cannot equate the business of the father with the business of the partnership of the sons as a company contemplated under section 23-C of the Act.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the Order No. M.F.E.N F. IV/63-64, dated 6th January, 1965, passed by the respondent, the Director, Enforcement Directorate, New Delhi, and quash the said order.

M.R M. Abdul Karim, P.M. Jumma Khan and *P.L. Meyyappan*, for Petitioner.

Habibulla Badsha, Standing Counsel for Central Government, for Respondent.

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* W.P. No. 695 of 1965. 25th March, 1968.

The Court made the following

ORDER.—The petitioner is a partnership firm consisting of brothers. It was formed in the year 1959. The firm has filed this writ petition to quash the order dated 6th January, 1965, passed by the Director, Enforcement Directorate, Ministry of Finance, New Delhi, levying a penalty of Rs. 10,000 under section 23 (1) (*a*) of the Foreign Exchange Regulation Act, 1947, for contravention of the provisions of section 5 (1) of the Act.

As a result of the search of the petitioner's premises under the provisions of section 19 (3) of the Act, certain incriminating documents were seized and a close scrutiny of the documents revealed, according to the Department, a number of contraventions of the provisions of the Act. The petitioner was called upon to give full details about the petitioner's connection with one K.S. Mohamed Ismail of Penang. Not being satisfied with the explanation offered, the Department proceeded to take proceedings under section 23 D. Finally, the Department found the petitioner firm guilty of contravening the provisions of section 5 (1) of the Act relating to restrictions on payments and imposed the penalty aforementioned.

According to the petitioner, the partnership firm was formed on 14th April, 1959. Before that date, the petitioner-company known as Thulkarunai & Co. was the sole proprietorship concern of the father of the present partners including the petitioner representing the firm in this writ petition. The proprietorship concern was in existence from 16th August, 1940 to 11th April, 1959, when the father died. Soon after the death of their father, the sons formed the partnership firm and carried over all the assets and liabilities of the sole proprietorship concern of their father and continued the business. In the course of their business, they found that their father had continuous dealings with one K.S.M. Ismail, Madurai, from 1952. During the course of the hearing of the writ petition, I directed the petitioner to file a statement of accounts, and the company has accordingly filed a statement of account of K.S.M. Ismail, Madurai, as found in the ledger of P.N.P. Thulkarunai & Co. between 1953 and 1963. One sees in the account that large amounts had been taken as loan by the petitioners' father from K.S.M. Ismail, Madurai, and all those amounts had been adjusted from time to time by payments to third parties under instructions and these amounts had been debited in his account. According to the petitioner, this K.S.M. Ismail and his brothers had ancestral business in Penang under the name and style of K. Sultan Alaudeen Sons. They had a branch at Madurai. On 1st January, 1953, the partnership firm was dissolved and K.S.M. Ismail continued to have his branch at Madurai. This petitioner-firm has nothing to do with the business activities of the Penang firm. The father of the petitioners had transactions ever since 1952 with the said Madurai firm and in the account books of the sole proprietorship concern of the father, there was a folio in the name of K.S.M. Ismail & Brothers, Madurai, until 1st January, 1953, and subsequently in the name of K.S.M. Ismail, Madurai. The accounts were not closed at the time of the death of their father and the petitioners' firm had perforce to continue the accounts.

The learned Counsel for the petitioners contends that the entire transactions were with the Madurai Branch which is an independent entity, that borrowing loans and crediting the same to the lender's account does not amount to placing any sum to the credit of any person resident in India within the meaning of section 5 (1) (*d*) of the Act, that the petitioners are not liable for any act done by their father and that the sole proprietorship concern was not a family concern as mentioned by the Department.

I see much force in the contentions of learned Counsel for the petitioner. It is true that under section 23-C of the Act, if the person committing a contravention is a company, every person who, at the time the contravention was committed, was in charge of and was responsible to the company for the conduct of the business of the company, shall be deemed to be guilty of the contravention. But the acts in this case are alleged to have taken place in the sole proprietorship concern of their father. The petitioners, that is, the sons have had no interest in the concern of their father. They have not taken part in the management or control of the business during the

lifetime of their father. The sons were not in charge of or responsible to the company for the conduct of the business of the sole proprietorship concern of their father at the relevant time. There is no provision in the Foreign Exchange Regulation Act that, if there is any contravention of the provisions of the Act by the father, his legal representatives would be vicariously liable and responsible for the same. The action taken by the Department against the legal representatives of Thulkarunai (father) is in the nature of enforcement of the doctrine of vicarious liability.

The application of the doctrine of vicarious liability in criminal law may be described as actuated by necessity rather than desirability. Criminal responsibility is generally regarded as being essentially personal in character, and it is with considerable diffidence that the principle is accepted whereby a man may be found guilty and punished for an offence which is actually committed by another. In Salmond's Jurisprudence, it is stated at page 366 :

> " .. .. there are two conditions to be fulfilled before penal responsibility can rightly be imposed The one is the doing of some act by the person to be held liable. A man is to be accounted responsible only for what he himself does not for what other persons do, or for events independent of human activity altogether. The other is the *mens rea* or guilty mind with which the act is done "

One member of a family is not vicariously liable for acts of another member, merely because of the family relationship. Thus, one spouse is not liable for the torts of the other , nor the parent for the torts of the child if nothing more than relationship appears in the case In the case of partnership, it may be vicariously liable for the tortious acts of its agents and employees just as any other business unit may. This doctrine can also be extended to joint enterprise. This doctrine of vicarious liability has been severely criticised in modern times by Judges in clear and unmistakable terms. Lord Goddard delivering judgment in *Gardner* v. *Akeroyd*[1], observed :

> " That it is a necessary doctrine for the proper enforcement of much modern legislation none would deny, but it is not one to be extended Just as in former days the term ' odious ' was applied to some forms of estoppel, so might it be to vicarious liability. It makes a person guilty of an offence actually committed by another when he may have no knowledge that it was being committed or may have done his best to prevent it."

Thus the doctrine of vicarious liability is not of general application in the field of statutory crimes It is a matter of construction in each case It is worthwhile to quote the words of Atkin, J. in *Mousell Brothers* v. *L N W. Rly. Co* [2]

> " ... regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in circumstances be performed, and the person upon whom the penalty is imposed."

If we apply the above principles to the facts of the instant case, it is clear that the sons of Thulkarunai would not be liable to pay the penalty of Rs 10,000 imposed on them for the alleged acts of contravention by their father The Department cannot fasten the liability on the sons on the ground that they have succeeded to their father's business They are no doubt the heirs of their father But when they succeeded to the estate of their father, they formed themselves into a partnership business. They never partook of any interest in the sole proprietory concern of their father It is not the case of the Department that the petitioners had any knowledge of the transactions mentioned in the statement of account By merely stating that Thulkarunai & Company is a family concern, the Department cannot equate the business of the father with the business of the partnership of the sons as a company contemplated in section 23-C of the Act. In '*mens rea* in Statutory Offences' by Edwards, it is observed at page 243 :

> "So long as modern legislation continues to intrude itself into every sphere of trading,business, health and social welfare activities, laying down elaborate codes of conduct to be observed by responsible officials, so, too, the doctrine of vicarious liability will continue to be an evil necessity. But each gesture on the part of the judiciary and of the Legislature which refuses to extend this obnoxious principle is to be applauded "

I entirely agree with the statement made by the learned author, and I refuse to extend the obnoxious doctrine of vicarious liability to the case of the sons of Thulkarunai

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1. L R (1952) 2 Q B 743 at p 751 : (1952) 2 All E.R 306

2. L R (1917) 2 K.B. 836 at 845 : 87 L.J K.B. 82

who are not responsible for the acts, if any, of contravention by their father while he was running the sole proprietorship concern. Further, it is clear that there is no provision in the Act itself that the legal representatives of a person who had contravened the provisions of the Foreign Exchange Regulation Act would also be liable for the penalty provided in the Act Originally, even in the Income-tax Act, there was no such provision It was only after the decision in *Commissioner of Income-tax* v. *Ellis C. Reid*[1] that the Income-tax Act was amended, so as to make the legal representatives of an assessee liable to pay the tax due by the assessee. I do not think, therefore, that the Department is right in imposing a penalty of Rs 10,000 on the legal representatives of Thulkarunai & Company which was originally run by the father as a sole proprietorship concern.

The writ petition is allowed ; the impugned order is quashed. No costs.

K.G S. ——— *Petition allowed*; *writ of* certiorari *issued*.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE T VENKATADRI

Km Rm Kumarappa Chettiar .. *Appellant**

v.

Ramana Gounder and others .. *Respondents.*

Hindu Law—Pious obligation rule—Discharge of the father in insolvency proceedings—Discharge, if puts an end to liability of sons in respect of debts due and payable by the father.

When once the father has been discharged under section 44 (1) of the Provincial Insolvency Act, sub-section (3) to section 44 cannot be made applicable to the sons [members of the Hindu joint family] when they are sued on the same debt Therefore, the order of discharge will put an end to liability of sons in respect of the debts due and payable by the father

Appeal against the decree of the District Court, Coimbatore, dated 20th November 1962 in A S 145 of 1961 preferred against the decree of the Sub-Court, Coimbatore in O S No. 226 of 1956

P. S. Balakrishna Ayyar and *P S Ramachandran*, for Appellant.

R. Narayanaswami and *D. Meenakshisundaram*, for Respondents.

The Court delivered the following

JUDGMENT :—This appeal arises out of a suit instituted by the appellant for recovery of a sum of Rs 6,200 with interest on the foot of a promissory note executed by the first defendant in favour of the appellant herein. The first defendant is the father. Defendants 2 and 3 are his sons. Defendants 2 and 3 and their father were members of a joint Hindu family. On 7th February, 1952 the first defendant executed a promissory note for Rs. 3,650 in favour of the plaintiff On 1st July, 1953 the first defendant executed a settlement deed in favour of his minor sons of the entire estate He did not provide any property or make any arrangement to discharge the promissory note debt Subsequent to the execution of the settlement, on 14th June, 1954, the father executed another promissory note for a sum of Rs 6,200 which, according to him, was made up of Rs 2,036 received in cash and Rs. 4,615 due on earlier promissory note The plaintiff gave a notice on 15th June, 1955 calling upon the first defendant to pay the amount due and payable in respect of the promissory note for Rs 6,200 Subsequently the first defendant filed an insolvency petition I P. No. 60 of 1956 on the file of the Sub-Court, Coimbatore In the schedule to his application he showed his assets as nil In this I P No 60 of 1956 the present plaintiff was a party. He contested the application that he should not be adjudicated insolvent but in spite of the objection the first defendant was adjudicated insolvent Then the first defendant filed an application for discharge Here again the

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1 (1931) 33 Bom.L.R. 388: I.L.R 55 Bom. 312. A.I.R. 1931 Bom 333.
* S.A. No. 1746 of 1963. 1st August, 1967.

plaintiff was given notice and he contested the same But nonetheless the first defendant was given a discharge on 11th September, 1957

Even before the discharge of the first defendant in the insolvency proceedings the plaintiff has filed the present suit against both the father and the defendants 2 and 3, his sons on the foot of the promissory note executed by the father, the first defendant, for a sum of Rs 6,200 The plaintiff's case is that even though the father is discharged, defendants 2 and 3, the sons of the first defendant, being members of the Hindu joint family are liable to pay this debt The defence to the suit by the sons, that is defendants 2 and 3, is that once the liability due and payable by their father to the plaintiff was discharged in the insolvency proceedings they are not bound in law by the debt of their father. It is on these proceedings that the parties went to trial The Courts below dismissed the suit, so far as defendants 2 and 3 are concerned, since it was found that they were not bound in law to pay the debt due and payable by their father, the first defendant It is against this judgment and decree the plaintiff has preferred this Second Appeal

In this appeal the learned Counsel for the appellant contended before me that mere discharge in insolvency proceedings would not save defendants 2 and 3 from the liability of their father He cited *S. Subbarao* v. *Narasimha Rao*[1], which is more or less similar to the facts of the present case. In that case the father executed a promissory note in favour of the plaintiff and obtained a decree against him. Subsequent to the filing of the suit the father was adjudicated insolvent and a composition in the insolvency proceedings was passed wherein it was declared that 3 annas in the rupee should be paid to the creditors When the plaintiff, who instituted the suit before the insolvency proceedings and obtained a decree against the father only, was taking execution proceedings against the sons, it was contended by the sons that since they had become divided from their father, they were not in law liable to pay the decree amount But when the matter came finally to the High Court, it was held that the composition or scheme which had been arrived at in insolvency proceedings of the father did not reduce the debt or extinguish it in so far as the sons were concerned and that the sons were liable to pay the entire debt. There is some force in the contention urged by the learned Counsel for the appellant in view of the above decision. But my attention has been invited to the decision in *Narayana* v. *Veerappa*[2], where it was observed at page 584, as follows :—

> " The liability of a Hindu son to pay the debts of his father not being illegal or immoral (avyavaharika) has been developed by judicial decisions from his pious obligation to save the father from sin, as laid down by the Hindu law texts. This liability as now developed is certainly not a joint liability, nor a joint and several liability as ordinarily understood in English law ; in fact it is difficult to bring it under any particular legal category of the English law "

The above decision was followed in *Rangaswami Aiyangar* v. *Sivaprakasa Pillai*[3], where it was observed as follows :—

> " The son's liability under the pious obligation rule in no sense arises out of contract. His liability arises solely from the fact that he is the son of his father and his personal law regards it as being right and proper that he should pay his father's debts. His liability is personal to himself. This does not mean that he is personally responsible in the ordinary acceptance of the expression of personal liability but that the obligation devolves upon him by reason of his relationship."

Therefore, what their Lordships have stated in the above decision has force When once the father has been discharged under section 44 (1) of the Provincia. Insolvency Act, sub-section (3) to section 44 cannot be made applicable to the sons

1. (1965) 1 An.W.R 369 : A I R 1965 Andh Pra. 285.
2. (1917) 31 M.L J. 386 . I.L.R. 40 Mad. 581 (584).
3. (1941) 2 M.L J. 883 . I.L.R. (1942) Mad. 251 at 259.

when they are sued on the same debt Therefore the order of discharge will put an end to the liability of the sons in respect of the debts due and payable by the father But the learned Counsel for the appellant contended before me that the settlement deed was executed before the insolvency and there is no finding in regarding to the liability or genuineness of the promissory note and therefore he should be given opportunity to attack in insolvency proceedings the validity of the settlement deed of the father in favour of the sons He is always at liberty to do so in insolvency proceedings. But so far as this suit is concerned, the sons are not liable to pay any amount due and payable by their father under the promissory note executed by him. The Second Appeal fails and is dismissed; but there will be no order as to costs throughout. No leave

V M K. — *Second appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE K.S. VENKATARAMAN

Unnamalai Achi and another .. *Petitioners**

v.

Umayal Achi and others .. *Respondents.*

Civil Procedure Code (V of 1908), sections 73 and 151 and Order 39, rules 1 and 2—Scope—Injunction, if could be issued, even if the case does not fall under Order 39—Limitations.

One *U A* filed a suit against one *M* for recovery of a certain sum of money on the basis that she has deposited the said sum with *M* repayable with interest. The said suit was dismissed She went in appeal against the order of dismissal of her suit. In the meantime one *R* who had obtained a decree against *M* sought to recover the decreed amount by way of sale of the house of *M* in execution proceedings. Could *U A* restrain *R* from selling the house in execution of the decree pending disposal of her appeal?

Held, that an injunction could be issued under section 151 of the Code of Civil Procedure in a suitable case even though the case does not fall within the terms of Order 39, rules 1 and 2, but it is obvious that this is not a proper case where an injunction could be issued under section 151 of the Civil Procedure Code It would be going contrary to the intention of the Legislature to issue an injunction preventing *R* from executing his decree so as to enable *U A* to apply for rateable distribution under section 73 of Civil Procedure Code Such an injunction would defeat the rights of *R*. The issue of an injunction should neither conflict with the express provisions of the Code nor go against the intentions of the Legislature

It should not affect the substantive rights of the party against whom the injunction is issued *Manoharlal Chopra* v *Rai Bahadur Rao Raja Seth Hiralal*, (1962) 1 S C R (Supp) 450 followed.

Held also that, *R* cannot be impleaded as a party in the appeal An injunction cannot be issued under section 151, Civil Procedue Code, even if he could be impleaded as party in appeal

Petitions praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue an injunction restraining the third respondent (now to be impleaded) herein from selling the suit properties in Original Suit No 44 of 1966 on the file of the Subordinate Judge of Devakottai in pursuance of the Execution Petition No 86 of 1965 in Original Suit No 3 of 1965 on the file of the Subordinate Judge of Devokattai pending Appeal No 46 of 1967 preferred to the High Court against the decree of the Subordinate Judge of Devakottai in the said Original Suit No 44 of 1966 and to implead the respondent herein as party respondent in the said Appeal No 416 of 1967 on the file of the High Court, and to vacate the interim injunction granted on 30th June, 1967 in Civil

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*C M P Nos. 7599, 7600 and 9140 of 1967
Appeal No 416 of 1967 24th August, 1967.

Miscellaneous Petition No 7599 of 1967 in the said Appeal No 416 of 1967 on the file of the High Court

V V Raghavan, for Petitioners.

K. Parasaran, for Respondents.

The Court made the following

ORDER.—One Unnamalai Achi filed a suit Original Suit No 44 of 1966 on the file of the Court of the Subordinate Judge of Devokattai, against one Murugappa Chetty for recovery of a sum of Rs 26,560 on the basis that she had deposited a sum of Rs 21,136-50 with Murugappa Chetty repayable with compound interest. Murugappa Chetty died during the suit and defendants 2 to 5 were impleaded as his legal representatives Defendants 3 and 4 allowed the suit to be decreed *ex parte* The other two merely put the plaintiff to proof of the claim The learned Subordinate Judge who tried the suit held against the plaintiff and dismissed the suit. Appeal Suit No 416 of 1967 has been preferred by the plaintiff Unnamalai Achi against the four legal representatives

In the meantime, one Ramaswami Chetty who obtained a decree in Original Suit No 3 of 1965 on the file of the Court of the Subordinate Judge, Devakottai against the said Murugappa Chetty for a sum of over Rs 25,000 on 25th January, 1965, filed Execution Petition No 86 of 1965 for recovery of the amount by sale of the house of Murugappa Chetty in Palangudi in Ramanathapuram District.

Civil Miscellaneous Petitions Nos 7599 and 7600 of 1967 have been filed by Unnamalai Achi against the said Ramasawami Chetty. Civil Miscellaenous Petition No 7599 of 1967 is for an injunction restraining Ramaswami Chetty from selling the house in execution of the decree in Original Suit No 3 of 1965 pending disposal of Appeal Suit No 416 of 1967 Civil Miscellaneous Petition No 7600 of 1967 is an application to implead the said Ramaswami Chety as a respondent in Appeal Suit No 416 of 1967 The petitioner states in her affidavit that besides herself and the said Ramaswami Chetty, there are also other creditors of Murugappa, that the total debts due from the deceased Murugappa Chetty would be in the region of Rs 80,000 that the house if sold in Court auction would fetch only about Rs 50,000, that all the creditors would have to share the sale proceeds rateably and that in order to enable the creditors to obtain rateable distribution (under section 73, Civil Procedure Code), it will be necessary to allow time to creditors like Unnamalai Achi to obtain decrees and file execution petitions before the assets are received by the executing Court If they are not enabled to do so, Ramaswami Chetty alone would take away the entire amount due to him in execution of his decree and the claims of persons like Unnamalai Achi will be prejudiced. Impliedly the affidavit proceeds on the assumption that the house in Palangudi is the only property of Murugappa Chetty and that was explicitly stressed during arguments by Unnamalai Achi's learned Counsel Sri V V Raghavan Section 73 (1), Civil Procedure which is relied on, so far as it is material, states :

> " Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realisation, shall be rateably distributed among all such persons."

The point which is emphasised is that the execution petition should be filed before the receipt of assets in the executing Court For that purpose, Unnamalai Achi should first obtain a decree in Appeal Suit No 416 of 1967. It is urged by her learned Counsel that the defendants in Original Suit No 44 of 1966 did not adduce any evidence and that there is every probability of Appeal Suit No. 416 of 1967 being allowed. He prays that the hearing of the appeal may be expedited.

A temporary injunction was granted on 30th June, 1967 restraining Ramaswami Chetty, from proceeding with the execution. He has filed Civil Miscellaneous

Petition No. 9140 of 1967 to vacate the injunction He states in his counter-affidavit that it is a strange proposition of law that a creditor like him should wait till the other creditors like Unnamali Achi obtained decrees and filed execution petitions He also states that there are other properties of the judgment-debtor from which Unnamalai Achi could recover her alleged dues. He also stresses the fact that he is neither a necessary nor a proper party to Appeal Suit No. 416 of 1967 and that the application to implead him should also be dismissed.

Taking the position as it stands, Ramaswami Chetty is not a party in Appeal Suit No 416 of 1967. In the case of such a person who is not a party, no injunction can be issued under Order 39, Civil Procedure Code This is clear from the provisions of Order 39, rules 1 and 2 The injunction is issued only temporarily pending disposal of the suit and the assumption is that the same question will be tried in the suit concerning the party against whom the injunction is sought Authorities are not necessary for this simple proposition However, as authorities may be mentioned *Balbir Prasad* v *Jugul Kishore*[1], *Meston School Society* v *Kashi Nath*[2], see also the other cases quoted in A I R commentary under Order 39, rule 1 under Note 13, and also Mulla's Civil Procedure Code, 1952 Edn. page 1154 Sri K. Parasaran, learned Counsel for Ramaswami Chetty, has also cited the decision in *Aboobucker* v. *Kunhamoo*[3], and *State of Orissa* v. *Madan Goapl*[4], to show that where relief cannot be granted in the appeal itself against Ramaswami Chetty, a temporary injunction cannot be issued

Further, the only provisions in Order 39, rules 1 and 2 which can at all be invoked by Unnamalai Achi are that the property is dispute in the appeal is in danger of being wrongfully sold in execution of a decree, or that it is necessary to restrain Ramaswami Chetty from committing an injury against the plaintiff Now it will be seen that the house in question is not in dispute in Appeal Suit No 416 of 1967. That apart, it cannot possibly be said that Ramaswami Chetty is wrongfully seeking to sell it in execution of his decree He is entitled to execute the decree and it is not disputed that it is the property of the judgment-debtor Murugappa Chetty. Similarly, it cannot be urged that Ramaswami Chetty will be committing any injury to Unnamalai Achi by proceeding with the execution of his decree. Ramaswami Chetty owes no duty to the plaintiff to wait till Unnamalai Achi obtains a decree and files an execution petition

The point need not be laboured further because Sri V. V Raghavan did not seriously contend that he could invoke the provisions of Order 39, Civil Procedure Code. But he urged that he could invoke the inherent powers of the Court under section 151 Civil Procedure Code for issuing the injunction against Ramaswami Chetty That provision says :

> " Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

In support of this contention, Sri V V Raghavan relies on the majority decision of the Supreme Court in *Manoharlal Chopra* v *Rai Bahadur Rao Raja Seth Hiralal*[5]. In that case, their Lordships point out that some High Courts have taken the view that in the matter of injunction, because of section 94 (*c*), interim injunction could be granted by the Court only within the terms of Order 39, but that other High Courts have taken the view that an injunction could be granted in proper cases under section 151, Civil Procedrue Code also Their Lordships held that in suitable cases injunction could be issued under section 151, Civil Procedure Code.

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1. (1918) 46 I C 473
2. A I R 1951 All. 556
3. (1958) 1 M.L.J. 303 . I L.R. (1958) Mad. 720.
4. (1951) S C J 764 · (1952) S C R 28: (1951) 2 M L J 645 A I R 1952 S C 12, 14.
5. (1962) 1 S.C.R (Supp.) 450.

In view of this decision, it cannot now be doubted that an injunction could be issued under section 151, Civil Procedure Code in a suitable case, even though the case does not fall within the terms of Order 39, rules 1 and 2 Civil Procedure Code But it is obvious that this is not a proper case where an injunction could be issued under section 151, Civil Procedure Code either Turning to the wording of section 151, Civil Procedure Code, this is not a case where it is necessary for the ends of justice to issue an injunction and it cannot be said either that Ramaswami Chetty is abusing the process of Court by executing his decree and that in order to prevent him, an injunction should be issued The law permits Ramaswami to proceed with the execution and there is no rule or justice which can stand in his way. In fact, section 73, Civil Procedure Code itself contemplates that he will become liable to share the assets realised in execution of his decree rateably with other persons only if the other persons have obtained decrees and filed execution petitions before the receipt of the assets in the executing Court This clearly shows the intention of the Legislature on the point It would be going contrary to the intention of the Legislature to issue an injunction preventing Ramaswami Chetty from executing his decree so as to enable Unnamalai Achi, and possibly others, to apply for rateable distribution under section 73, Civil Procedure Code Such an injunction would defeat the substantive rights of Ramaswami Chetty It is worthy of note that their Lordships of the Supreme Court have indicated in the very decision relied on by Sri V V Raghavan that the issue of an injunction should not conflict with the express provisions of the Code or against the intentions of the Legislature and should not affect the substantive rights of the party against whom the injunction is issued. Thus at pages 461, 462, their Lordships say.

> "But these powers are not to be exercised when their exercise may be in conflict with what had been expressly provided in the Code or against the intentions of the Legislature."
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> * * * * *
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> " ....The inherent powers saved by section 151 of the Code are with respect to the procedure to be followed by the Court in deciding the cause before it.
>
> "These powers are not powers over the substantive rights which any litigant possesses. Specific powers have to be conferred on the Courts for passing such orders which would affect such rights of a party Such powers cannot come within the scope of inherent powers of the Court in matters of procedure, which powers have their source in the Court possessing all the essential powers to regulate its practice and procedure "

Sri V.V. Raghavan referred to the cases in which injunction was issued under section 151, Civil Procedure Code and which were referred to with approval by the Supreme Court. They are *Dhaneshwar Nath Tewari* v *Ganshyam Dhar Misra*[1], *Becharam Baburam* v. *Baldeo Sahai Surajamal*[2], *Bhagat Singh Bugga* v *Dewan Jagbir Sawhney*[3], and *The Chinese Tannery Owners' Association* v *Makhan Lal Ganguly*[4]. But those cases are easily distinguishable Thus, in *Dhaneshwar Nath Tewari* v *Ghanshyam Dhar Misra*[1], the suit was by a reversioner against a person claiming to be the adopted son of the last male owner and a temporary injunction was issued against alienation and receipt of assets belonging to the deceased In *Becharam Babu Ram* v. *Baldeo Sahai Surajmal*[2], contrary to the agreement between the parties that their disputes should be decided by the Court at Meerut (in United Province), one of the parties brought the suit in the Punjab and an injunction was issued restraining him In *Bhagat Singh Bugga* v *Dewan Jagbir Sawhney*[3], cross suits were brought in the Calcutta High Court and in the Gujranwala Sub-Court, near Lucknow Sawhney, the defendant in the Calcutta suit, was restrained by an injunction from proceeding with the suit in

1 I L R (1940) All 201
2. I L R. (1940) All 232.
3. I L R (1941) 1 Cal 490
4 I.L R (1953) 2 Cal 11.

Gujranwala on the ground that that suit had been instituted by him with the sole object of harassing Bhagat Singh Bugga when really it should have been instituted only at Calcutta Section 151, Civil Procedure Code was relied on Similarly in *The Chinese Tannery Owners' Association* v *Makhan Lal Ganguly*[1], it was recognised that injunction could be issued in a proper case under section 151, Civil Procedure Code but on the facts of that case injunction was not issued The injunction issued by the Lower Court was cancelled.

Turning now to the prayer for impleading Ramaswami Chetty as a party in Appeal Suit No 416 of 1967 it is obvious that he is neither a necessary nor a proper party within the meaning of Order I, rule 10, Civil Procedure Code and his presence is not at all necessary for the determination of the point in controversy in Appeal Suit No. 416 of 1967 In fact, Sri V V Raghavan submitted that the application was filed in order to get over the objection that under Order 39, Civil Procedure Code an injunction could not be issued against a person not a party to the appeal It is clear that on the principles which have been discussed already. Ramaswami Chetty cannot be impleaded and that an injunction cannot be issued under section 151, Civil Procedure Code even if he could be impleaded as a party in Appeal Suit No 416 of 1967 Civil Miscellaneous Petitions Nos 7599 and 7600 of 1967 are accordingly dismissed with costs. The injunction already issued is vacated.

V.M.K. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE M. M ISMAIL

Subramanian and another .. *Appellants**

v.

Kaliammal and others .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 41, *rule* 23 *(Madras)—Scope—Remand under—When justified—" In the interests of justice "—Meaning of*

Before an appellate Court can remand a matter for fresh disposal to the lower Court under Order 41, rule 23, first it must come to a conclusion that the decision of the trial Court is liable to be reversed or set aside In the absence of such a conclusion a power of remand is not available to an appellate Court Thus, where a remand order is passed whether in a case where a suit has been disposed of upon a preliminary point or in a case where a suit has been disposed of on merits, the condition precedent for the exercise of the power of remand is a finding by the appellate Court that the judgment and decree of the trial Court is erroneous on facts or on law and therefore liable to be reversed or set aside So long as that finding has not been arrived at, there is no scope for the appellate Court reversing or setting aside the judgment and decree of the trial Court and as a consequence thereof remanding the suit for fresh disposal.

The expression " where the appellate Court considers it necessary in the interests of justice to remand the case " in Order 41, rule 23, as amended by Madras High Court, has to be considered with the other alternative that on having set aside the judgment and decree of the trial Court, the appellate Court itself will have to finally dispose of the matter in the appeal Consequently the contrast is between the power to remand for fresh disposal and the power to decide by the appellate Court itself, with the result the expression " in the interests of justice " has reference to the appellate Court remanding a suit for fresh disposal instead of itself deciding it The expression " interests of justice " does not widen the power of the appellate Court to remand a suit in the sense that irrespective of the fact

1. I L R (1953) 2 Cal 11.

* A.A.O No 43 of 1965. 30th November, 1967.

whether it comes to the conclusion that the judgment and decree of the trial Court are liable to be reversed or set aside or not, if the appellate Court is of opinion that the interests of justice require that there should be a fresh trial, it can remand the suit for fresh disposal. There is no principle or authority to support such a contention

Appeal against the order of the Court of the Subordinate Judge, Nagercoil, dated 22nd October, 1964 and made in A S No 96 of 1964 (O S No. 120 of 1962, District Munsif Court (Additional) Nagercoil)

T R Ramachandran and *V Sankarasubramani Ayyar*, for Appellants

R Gopalaswami Ayyangar, for Respondents

The Court delivered the following

JUDGMENT —One daughter and the descendants of other two daughters of one Thanuvan Arumugham filed O S No 120 of 1962 on the file of the Court of the Additional District Munsif of Nageroil praying for a declaration of their title to and possession of the plaint property and for a declaration that the defendants had neither title to nor possession of the plaint property and for a permanent injunction restraining the defendants from entering into possession of the plaint property. The plaint property was described as S. No 4140 and of an extent of 3 acres 54 cents in Therur village The defendants in the suit contested the claim of the plaintiffs alleging that the suit property never belonged to Arumugham and they were the persons entitled to the property.

The basis of the claim of the plaintiffs was that the suit property belonged to Thanuvan Arumugham who had three daughters and two sons and after the death of Arumugham the property was divided as between the three daughters and two sons under Exhibit A-1 and since the two brothers died unmarried their shares also came to the three sisters and those shares also were divided between them under Exhibit A-2 In view of this the defendants contended that the suit property not merely did not belong to Arumugham but also was not included in Exhibits A-1 and A-2. The learned District Munsif struck the necessary issues and came to the conclusion that the plaintiffs were not the owners of the suit property, that they did not have possession of the suit property and on these findings dismissed the suit. In view of the arguments advanced before me it is necessary to refer to the contentions put forward before the trial Court and how they were dealt with

As I pointed out already in the plaint the claim of the plaintiffs was based on title and the basis was that the property originally belonged to Arumugham and after his death it belonged to the five children of Arumugham and after the death of the two sons the properties came to be enjoyed by the three daughters under Exhibits A-1 and A-2 Exhibits A-1 and A-2 did not contain this Survey Number nor the extent. On the other hand Exhibits A-1 and A-2 contained a different survey number, namely S No 4154 of an extent of 3 acres 24 cents In view of this the plaintiffs contended before the trial Court that in Exhibits A-1 and A-2 instead of referring to S No 4140 and the extent of 3 acres 54 cents it was mistakenly referred to as S No. 4154 of an extent of 3 acres 24 cents The learned District Munsif considered this contention of the plaintiffs and came to the conclusion that there could not have been any mistake with regard to the description of the property in Exhibits A-1 and A-2 It may be noticed that not merely the extent and the survey number of the property differed but also, as pointed out by the learned District Munsif the description and the nature of the property also differed. Under Exhibit B-1, a copy of the settlement register for S Nos 4140 and 4154 the former was described as *jenmam* while the latter was described as Pandara pattom Again in Exhibit A-1 and Exhibit A-2 the property was described as Pandara otti Therefore the learned District Munsif came to the conclusion that the extent of the property. the description and the name of the property comprised in Exhibits A-1 and A-2 are quite different from those of the suit property. A further argument was advanced before the learned

District Munsif in respect of the identity of the property The argument was that notwithstanding the difference in the survey number and the extent and nature of the property the boundary description of the property will establish the correct property dealt with under Exhibits A-1 and A-2. Admittedly, though two boundaries tallied, two other boundaries did not tally with reference to names of the persons who owned the adjoining lands The learned District Munsif pointed out that there was no convincing evidence to explain the names of Maharajan found as northern and western owners in Exhibits A-1 and A-2 instead of the name Vallimuthu On the basis of these factors the learned District Munsif came to the conclusion that the plaintiffs in the suit could not be held to have derived any title to the property under Exhibits A-1 and A-2 The learned District Munsif also considered the claim of the plaintiffs that the property belonged to Arumugham and came to the conclusion that the plaintiffs had not established the same On considering tax receipts and other evidence placed before him the learned District Munsif also came to the conclusion that the plaintiffs had not established their possession of the suit property. It is on these findings, as I pointed out already, the suit was dismissed.

Against this judgment and decree of the learned District Munsif the plaintiffs preferred an appeal to the Subordinate Judge of Nagercoil The learned Subordinate Judge by his order dated 22nd October, 1964, set aside the judgment and decree of the trial Court and remanded the suit for fresh disposal. It is this order of remand that is challenged before me in this appeal by the defendants

It is necessary to set out the reasons which prompted the learned Subordinate Judge to remand the suit for fresh disposal Before the learned Subordinate Judge, the plaintiffs produced the copy of the settlement case relating to S No 4140 On a perusal of that settlement case the learned Subordinate Judge found that Thanuvan Arumugham had only an othi and the senior members of the other five families in whose names patta was issued had *jenmam* rights over the suit (property) survey number at the time of the settlement. The learned Subordinate Judge observed that the learned Counsel for the appellants before him argued for a remand of the case on the ground that the case set up by the plaintiffs before the lower Court turns out to be not correct because of the decision in the settlement case Consequently one of the grounds on the basis of which the order of remand wass passed was that the plaintiffs had not put forward a correct case and therefore they must be given an opportunity to put forward their correct case The second reasoning is to be inferred from the following observation of the learned Subrodinate Judge .

> "The want of plea is not the only point that is against the disposal of the case by the lower Court. On going through the lower Court judgment it is seen, that the parties to the suit had to face the want of evidence regarding the location of the suit property".

Having observed this, the learned Subordinate Judge considered that it was necessary to find out the relationship between Maharajan and Vallimuthu referred to already in order to identify or locate the property The third ground is with reference to the names of the properties in S Nos 4140 and 4154 The learned Subordinate Judge points out that in Exhibits A-1 and A-2 the name of the property is given as Manavilai which the real name of S No 4140 is Annamalai Idachivayal while the real name of S. No. 4154 is Manavilai Having mentioned this, the learned Subordinate Judge points out that the plaintiffs did not take out a commission to locate the property in the suit and it was for the plaintiffs to get the property in their possession located and establish the right to it before they can get a declaration and injunction Notwithstanding that, the reason that prompted the learned Subordinate Judge to order a remand as to enable the plaintiffs to apply for appointment of a Commissioner to locate the properties Again the learned Subordinate Judge points out that the plaintiffs had not added necessary parties to the suit which was one for a declaration regarding S No 4140 as a whole. Consequently the

the fourth ground that prompted the learned Subordinate Judge to remand the suit was to enable the plaintiffs to add the necessary parties to the suit. Having made these observations the learned Subordinate Judge concluded as follows :

> " In view of the above, I am constrained to hold that this suit has to be sent back to the lower Court for giving the plaintiffs an opportunity to get the property in dispute located with reference to S. Nos. 4140 and 4154 by taking out a commission with reference to Exhibits A-1 and A-2, A-12 to A-14, A-10 and B-3 and B-4, receive the documents produced here, get the original of the settlement case relating to the two survey numbers, permit the plaintiffs to get the plaint amended suitably, receive additional written statement from the defendants, strike necessary issues, permit the parties to adduce fresh evidence if necessary and get the suit disposed of according to law and the observations in this order ".

Mr. T. R. Ramachandran, the learned Counsel for the appellants, contends that on the face of the order of the learned Subordinate Judge the order of remand was not warranted. According to the learned Counsel, in essence the learned Subordinate Judge has asked the plaintiffs to file a fresh suit according to the advice given by him. Order 41, rule 23 of the Civil Procedure Code does not enable an appellate Court to remand the matter for fresh disposal to the lower Court under such circumstances.

On the other hand, Mr. Gopalaswamy Ayyangar, the learned Counsel for the respondents, contends that amendment to Order 41, rule 23, effected by the Madras High Court enables an appellate Court to remand a suit in the interests of justice and since the learned Subordinate Judge felt in this case that the interests of justice required that the suit should be remanded, he did so and the remand is warranted by the terms of Order 41, rule 23, Civil Procedure Code, as amended by the Madras High Court.

I am of the view that on the basis of the reasoning of the learned Subordinate Judge the order of remand cannot be sustained. Whether it was before the amendment of the Madras High Court or after, before an appellate Court can remand a matter for fresh disposal to the lower Court, first it must come to a conclusion that the decision of the trial Court is liable to be reversed or set aside. Order 41, rule 23 as amended by the Madras High Court is in the following terms :

> " Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, or where the appellate Court in reversing or setting aside the decree under appeal considers it necessary in the interests of justice to remand the case, the appellate Court may by order remand the case. . . . . ."

Where a remand order is passed whether in a case where a suit has been disposed of upon a preliminary point or in a case where a suit has been disposed of on merits, the condition precedent for the exercise of the power of remand is a finding by the appellate Court that the judgment and decree of the trial Court is erroneous on facts or on law and therefore liable to be reversed or set aside. So long as that finding has not been arrived at, there is no scope for the appellate Court reversing or setting aside the judgment and decree of the trial Court and as a consequence thereof remanding the suit for fresh disposal. Mr. R. Gopalaswamy Ayyangar was not able to point out to me that in any portion of the judgment of the appellate Court the learned Subordinate Judge has come to the conclusion that the judgment and decree of the trial Court were erroneous on the pleadings of the parties or on the evidence placed before it. It is not even the case that there has been a misunderstanding of the pleadings of the parties or a denial of an opportunity to the parties to place the materials they wanted to place before the Court, in support of their respective cases. Under such circumstances, in my view, a power of remand is not available to the appellate Court. The expression " where the appellate Court considers it necessary in the interests of justice to remand the case " has to be considered with the other alternative that on having set aside the judgment and decree of the trial Court, the appellate Court itself will have to finally dispose of the matter in the

appeal. Consequently the contrast is between the power to remand for fresh disposal and the power to decide by the appellate Court itself, with the result the expression 'in the interests of justice' has reference to the appellate Court in remanding a suit for fresh disposal instead of itself deciding it. The expression 'interests of justice' does not widen the power of the appellate Court to remand a suit in the sense that irrespective of the fact whether it comes to the conclusion that the judgment and decree of the trial Court are liable to be reversed or set aside or not, if the appellate Court is of opinion that the interests of justice require that there should be a fresh trial, it can remand the suit for fresh disposal. No principle or authority was brought to my notice which will support such a contention.

On the other hand, Mr T R Ramachandran, the learned Counsel for the appellants, brought to my notice several decisions of this Court which have considered the scope of the power of the appellate Court to pass an order of remand The learned Counsel referred to *Balasubramania* v *Subbiah*[1], and invited my attention to the following passage therein —

> "If the trial Court has not disposed of the suit on a preliminary point but has delivered judgment on merits it is the duty of the appellate Court to deal with the appeal on its merits It is only in exceptional cases where the judgment of the trial Court is wholly unintelligible or incomprehensible that the appellate Court can remand the suit for a fresh trial. The fact that there are some defects and infirmities in the reasoning of the trial Court is surely not a ground for the appellate Court not to do its duty of disposing of the appeal on merits The appellate Court will be acting clearly without jurisdiction, if it simply and mechanically remands a suit to the trial Court without applying its mind as to whether the judgment and the findings of the trial Court are correct and if not whether it should be reversed or set aside In other words, the appellate Court should come to the clear conclusion that the findings of the trial Court cannot be supported and must be set aside".

Basing himself on this observation, Mr T R Ramachandran argued that in this case there is no conclusion whatever by the learned Subordinate Judge that the findings of the trial Court cannot be supported and must be set aside.

To the same effect is the following observation in *Veeramma* v. *Lakshmayya*[2], (Head-note (c)).

> "It is only where the appellate Court finds it necessary to reverse or set aside the decree that it is entitled to remand the suit".

The decision of this Court in *Ramakrishna* v. *Rangayya*[3], also supports this position. It was observed in that case.

> "It has been repeatedly held by this Court that a remand should not, generally speaking, be ordered when the defect in the proceeding has been made due to the negligence or default of the party who will benefit by the remand. It has been further held that the mere fact that the evidence on record is not sufficient to enable a Court to come to a definite finding on the point in issue, is not sufficient to enable the Court to remand the case, when there is no reason to think that the parties did not have an opportunity of producing all the evidence that they desired to produce before the trial Court."

It is unnecessary to refer to the further decisions since the principle is clear, namely, that the jurisdiction of an appellate Court to remand a case for fresh disposal arises only if the Court comes to the conclusion that the findings of the trial Court are erroneous and are liable to be set aside or reversed In the absence of such a conclusion a power of remand is not available to an appellate Court As I pointed out

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1. I L R (1964) 2 Mad 586 A I.R 1965 Mad 488
2. (1948) 1 M.L.J. 427 : A.I.R. 1948 Mad. 417 at 419
3. A.I.R 1954 Mad. 783 at 784.

already in this case the appellate Court did not pass its order of remand on any error on the part of the trial Court or defect in the procedure adopted by the trial Court but merely to enable the plaintiffs to supply the deficiencies in their case and to do what they failed to do when they went to the Court with a definite case Under these circumstances I am of the view that the order of remand in this case cannot be sustained.

Therefore I allow this appeal and set aside the order of remand with the result the learned Subordinate Judge will have to consider the appeal afresh on merits with reference to the case of the parties and the evidence adduced by them in support of their respective cases No order as to costs No leave

V K. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE A ALAGIRISWAMI

The Corporation of Madras, Madras *Appellant**

v

Seethalakshmi Ammal and another *Respondents*

Madras City Municipal Act (IV of 1919), *section* 190—*Interpretation of—Whether commissioner to pay compensation before he enters upon any land to carry out works under section* 190

To hold that this proviso means that the Commissioner should pay compensation before he enters upon any land in which he proposes to carry out any of the works which he is empowered to carry out under section 190 would make the power conferred by the substantive part of the section meaningless and if the intention were that any work could be carried on in any land under section 190 only after the compensation has been paid, it might hold up the work interminably. First of all, damages will have to be ascertained and it is quite obvious that it cannot be ascertained before hand The second proviso to section 190 is quite clear and the claim for compensation cannot arise till the work is carried out and damage sustained

Appeal against the Decree of the Principal Judge, City Civil Court, Madras, in Appeal Suit No 280 of 1960 preferred against the Decree of the City Civil Court (Fifth Assistant Judge), Madras, in Original Suit No. 632 of 1959

T Chengalvaroyan, for Appellant.

V. Shyamdan, for Respondents

The Court delivered the following

JUDGMENT —The appellant is the Corporation of Madras The plaintiffs are the owners of O S No 160 and T S No. 5706 of an extent of 2½ grounds within the Madras Corporation limits The Corporation issued a notice to the plaintiffs under section 190 of the City Municipal Act proposing to dig a trench with a depth of 8 feet, breadth of 3 feet and length of 75 feet for laying sewers through the land of the plaintiffs. The plaintiffs thereupon filed the suit out of which the present appeal arises for a permanent injunction restraining the Corporation from proceeding with the laying of the aforesaid sewers The trial Court dismissed the suit But the appellate Court took the view that it is not open to the Corporation to exercise its powers under section 190 of the City Municipal Act without paying compensation to the persons on whose land work is proposed to be carried out and allowed the appeal and decreed the plaintiffs' suit The second appeal is against that judgment. I am of opinion that the lower appellate Court is clearly wrong in its interpretation.

*S. A No. 1310 of 1963. 28th April, 1967.

The second proviso to section 190 reads as follows —

"Provided further that the Commissioner shall with the sanction of the central committee pay compensation to any person who sustains damage by the exercise of such power"

To hold that this proviso means that the Commissioner should pay compensation before he enters upon any land in which he proposes to carry out any of the works which he is empowered to carry out under section 190 would make the power conferred by the substantive part of the section meaningless and if the intention were that any work could be carried on in any land under section 190 only after the compensation has been paid, it might hold up the work interminably First of all, damages will have to be ascertained and it is quite obvious that it cannot be ascertained before hand How can anybody decide what damages would be caused by the work to be carried out under section 190 before the work itself is carried out? Even after the compensation is decided, there may be disputes and the matter may be carried to the Chief Judge of the Small Cause Court under section 388 of the Act. That again may take years to be disposed of It may be necessary to carry out the works permitted to be carried out under section 190 urgently in order to safeguard the health or the convenience of the citizens and such a work cannot certainly be held up indefinitely. In any case, the second proviso to section 190 is quite clear on this point and the claim for compensation cannot arise till the work is carried out and damage sustained To say that the Commissioner should pay compensation even before the work has been carried out and any damage sustained is putting the cart before the horse The interpretation placed upon the proviso by the lower appellate Court is not at all justified

The second appeal is allowed and the plaintiffs' suit will stand dismissed Parties will bear their own costs throughout.

No leave.

S V J ——— *Second appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE N. KRISHNASWAMY REDDY

P. Velan .. *Petitioner**

Madras Panchayat Act (XXXV of 1958), *sections* 157 (1) *and* 169 *and Indian Penal Code (XLV of* 1860), *section* 409—*Breach of Trust by Executive Officer—Sanction for prosecution—Necessity of—Powers of sanction—Whether Government can delegate its powers to Collector*

The answer to the question, whether the revision petitioner committed breach of trust while acting or purporting to act in the discharge of his official duty as the Executive Officer of the Panchayat Board, mainly depends upon the fact whether the Executive Officer spent the amount drawn by him in fact for the purpose for which it was drawn and whether he was authorised to spend such amount. If he was authorised to spend and if he had spent according to the direction and authorisation, it can be said that he spent while acting in discharge of his duty If he had not spent the amount for the purpose for which it was drawn and committed breach of trust, it cannot be said that such breach of trust was committed while acting in discharge of his official duty

The trend of the decisions of the Supreme Court appears to be that (1) it is not every offence committed by a public servant that requires sanction for prosecution, (2) Nor even every act done by him while he is actually in the performance of his official duties, and (3) Sanction would be necessary if the act complained of is strictly concerned with his official duties so that it could be claimed to have been done by virtue of the office

Applying the principles laid down by the Supreme Court to the facts of this case, it was held that, it cannot be said that the criminal breach of trust or mis-

*Crl. R. C No. 572 of 1967 (Crl. R. P. No. 565 of 1967.) 23rd October, 1967.

appropriation committed by the revision petitioner was while he was acting in the discharge of his official duties, and hence no sanction was necessary

Obiter.—The Government can delegate its power of sanction to the Collector.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate, Tuticorin, dated 23rd March, 1967 in Crl M P No 87 of 1967 in C C. No 12 of 1967.

C F. Louis, for Petitioner

R Veeramani, for the Public Prosecutor, for State

The Court made the following

ORDER —This revision petition has been filed against the order of the Sub-Divisional Magistrate, Tuticorin, overruling the objection raised by the petitioner that the prosecution was void under section 403, Criminal Procedure Code

To appreciate the points raised by the learned Counsel for the petitioner, it may be necessary to state the relevant facts of the case The revision petitioner, Velan was the Executive Officer, Nazareth Panchayat Board in Tirunelveli District from 6th November, 1959 to 18th October, 1960 The Sub-Inspector of Police, Nazareth, filed a chargesheet before the Sub-Divisional Magistrate, Tuticorin, alleging that the petitioner in his capacity as the Executive Officer of the Nazareth Panchayat Board drew the Panchayat amounts from the local Co-operative bank, Nazareth, and from the Sub-Treasury, Tiruchendur, to the extent of Rs 1,350 by means of self-cheques and committed breach of trust of the said amounts by non-utilising the amounts for the purpose for which they were drawn, an offence punishable under section 409, Indian Penal Code.

The Sub-Divisional Magistrate took the case on file and after examining some witnesses had found that necessary sanction was not obtained under the provisions of the Madras Panchayat Act for prosecuting the petitioner and ultimately discharged the petitioner Against the order of the Sub-Divisional Magistrate, the State filed a revision before the Sessions Judge, Tirunelveli The Sessions Judge held that the order of discharge by the Sub-Divisional Magistrate must be deemed to be an acquittal as the case was disposed of by him after recording evidence and the statement of the petitioner and dismissed the revision petition on the ground that he had no jurisdiction to entertain the revision which was against an order of acquittal. Against the order of the Sessions Judge, the learned Public Prosecutor for Madras State filed a revision in the High Court Anantanarayanan, J, as he then was, remitted the matter to the Sessions Judge for disposal on the merits with the following observations .

"Under the circumstances, I set aside the order of the learned Sessions Judge, and remit the revision proceedings to him for disposal on the merits It is open to the learned Sessions Judge to hold if he is of that view, that no sanction is required But, in that case, he should really set aside the order of discharge, and direct further enquiry. Equally it is open to the learned Sessions Judge to hold that the case is bad for lack of sanction, however, viewed In that contingency, he can dismiss the revision proceedings on the excellent ground that he agrees with the trial Court It will then be for the State to take further proceedings to have the propriety of that view canvassad . . . . I must make it clear that, on the aspect of the prosecution being void for lack of sanction, I give entire freedom both to the State and to the accused (respondent) to advance all such arguments in law, as may be available, without this issue being clouded in any manner by prior opinions expressed by the Courts below upon this aspect"

The learned Sessions Judge, Tirunelveli, dismissed the revision petition after it was remitted to him on the ground that the sanction accorded under section 106 of the Madras Village Panchayats Act, 1950, was not valid as the offence alleged to

have been committed was subsequent to the Madras Panchayats Act XXXV of 1958 came into force. He further held that the sanction for prosecution should have been accorded under section 169 of the Act XXXV of 1958 This order by the learned Sessions Judge was passed on 9th February, 1966.

Subsequently, on 28th September, 1966, the Collector of Tirunelveli district accorded sanction under section 169 of the Madras Panchayats Act, 1958 for the prosecution of the revision petitioner for the offence of criminal breach of trust After obtaining sanction, a fresh charge sheet was filed by the Police before the Sub-Divisional Magistrate, Tuticorin, which was taken on file by the said Magistrate in C.C No. 12 of 1967 The revision petitioner filed an objection petition stating that the prosecution was barred under section 403 (1), Criminal Procedure Code, as the previous order by the Sub-Divisional Magistrate was also disposed of on merits and prayed that the proceedings should be dropped. The learned Sub-Divisional Magistrate overruled the objection of the petitioner holding that the prior proceedings are void in view of the fact that there was no valid sanction and that a fresh prosecution after obtaining necessary sanction would not be barred under section 403, Criminal Procedure Code.

The revision petitioner reiterated the objection taken by him before the Sub-Divisional Magistrate that the prosecution was barred under section 403, Criminal Procedure Code, and also raised a fresh point which was not urged before the Sub-Divisional Magistrate, that the sanction accorded by the Collector of Tirunelveli on 28th September, 1966, is not valid as the Government alone could accord sanction for prosecution and delegation by the Government to the Collector of its power to sanction prosecution is *ultra vires*. But, the learned Counsel did not press the point that the proceedings were barred under section 403, Criminal Procedure Code.

On the other hand, it was contended on behalf of the State that sanction for prosecution is not at all necessary in respect of the facts of this case and assuming that the sanction is necessary, the sanction accorded by the Collector is valid as the Government had delegated the power to sanction prosecution to the Collectors and that such delegation is not *ultra vires*.

It is, therefore, necessary to consider taking into consideration the facts of this case, whether sanction for prosecution is necessary If this point is answered in the negative, the question whether delegation by the Government of its power of sanction to prosecute is valid or not, may not arise

The charge against the petitioner is, as already noted that he as the Executive Officer of the Nazareth Panchayat Board drew the Panchayat amounts from the local co-operative bank, Nazareth, and from the Sub-Treasury, Tiruchendur, to the extent of Rs 1,350 and did not utilise the amounts for the purpose for which they were drawn and thus committed an offence punishable under section 409, Indian Penal Code The contention of the revision petitioner is that the amounts drawn by him as public servant were utilised for the purpose for which they were drawn and that he did not commit any breach of trust The petitioner is undoubtedly a public servant It appears he has got power to withdraw and utilise the moneys for the purpose for which they were drawn It is contended on behalf of the petitioner that since the offence alleged to have been committed by the petitioner was while acting in the discharge of his official duty, sanction for prosecution is necessary under section 169 (1) of the Madras Panchayats Act XXXV of 1958. Section 169 (1) reads as follows:

"When the President or the Executive Authority or the Chairman or Vice-Chairman of a Panchayat Union Council or the Commissioner or any member is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Government."

It may also be relevant to note section 157 (1) of the Act which runs as follows :—

"The Government may by notification authorise any authority or officer not below the rank of a Collector to exercise in regard to any panchayat or any class of panchayats in any area or in regard to any panchayat union council or any class of panchayat union councils or all panchayat union councils in any area any of the powers vested in them by this Act except the power to make rules and may in like manner withdraw such authority."

In pursuance of section 157 (1), a notification G O Ms No. 500, dated 2nd March, 1965, R D. and L A Department, Government of Madras, was issued by which the powers vested in the Government under sub-sections (1) and (2) of section 169 of the Act were delegated to the Collectors

The question now to be considered is whether the revision petitioner committed breach of trust while acting or purporting to act in the discharge of his official duty as the Executive Officer of the Panchayat Board The answer to this mainly depends upon the fact whether the Executive Officer spent the amount drawn by him in fact for the purpose for which it was drawn and whether he was authorised to spend such amount If he was authorised to spend and if he had spent according to the direction and authorisation, it can be said that he spent while acting in discharge of his duty If he had not spent the amount for the purpose for which it was drawn and committed breach of trust, it cannot be said that such breach of trust was committed while acting in discharge of his official duty.

The act of criminal misappropriation was not committed by the petitioner while he was acting or purporting to act in discharge of his official duties and the offence has no direct connection with the duties of the petitioner. I consider that the official status of the petitioner as Executive Officer provided an occasion or opportunity of committing the offence of misappropriation, by not utilising the amount for the purpose for which it was drawn

In *Amrik Singh* v. *State of Pepsu*[1], Venkatarama Ayyar, J, in dealing with section 197 (1), Criminal Procedure Code, which is *in pari materia* with section 169 (1) of the Madras Panchayats Act, on behalf of the majority, observed as follows —

"It is not every offence committed by a public servant that requires sanction for prosecution under section 197 (1), Criminal Procedure Code, nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary; and that would be so irrespective of whether it was, in fact, a proper discharge of his duties, because that would really be a matter of defence on the merits, which would have to be investigated at the trial, and could not arise at the stage of the grant of sanction, which must precede the institution of the prosecution

Even when the charge is one of misappropriation by a public servant, whether sanction is required under section 197 (1) will depend upon the facts of each case. If the acts complained of are so integrally connected with the duties attaching to the office as to be inseparable from them, then sanction under section 197 (1) would be necessary, but if there was no necessary connection between them and the performance of those duties, the official status furnishing only the occasion or opportunity for the acts, then no sanction would be required. The result then is that whether sanction is necessary to prosecute a public servant on a charge of criminal misappropriation, will depend on whether the acts complained of hinge on his duties as a public servant. If they do, then sanction is requisite But if they are unconnected with such duties, then no sanction is necessary"

In a subsequent decision reported in *Matajog Dobey* v. *H C. Bhari*[2], the observations made by Venkatarama Ayyar, J, in the above decision were quoted with approval.

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1 (1955) S C J 334 : (1955) 1 M L J. (S C) 198 (1955) 1 An W.R (S C) 198 A.I R 1955 S.C 309

2 (1956) S C J 110 : (1956) 1 M.L.J (S C) 79 : A I R. 1956 S.C 44

In *Om Prakash* v *State of U.P* [1], Govinda Menon, J., observed in paragraph 30 at page 464 as follows .—

" Quite a large body of case law in all the High Courts has held that a public servant committing criminal breach of trust does not normally act in his capacity as a public servant "

In *Satwant Singh* v *State of Punjab* [2], it has been observed by the majority in dealing with the scope of section 197, Criminal Procedure Code, as follows :—

" The act must bear such relation to the duty that the public servant could lay a reasonable but not a pretended or fanciful claim, that he did it in the course of the performance of his duty Some offences cannot by their very nature be regarded as having been committed by public servants while acting or purporting to act in the discharge of their official duty. Where a public servant commits the offence of cheating or abets another so to cheat, the offence committed by him is not one while he is acting or purporting to act in the discharge of his official duty, as such offence has no necessary connection between it and the permformance of the duties of a public servant, the official status furnishing only the occasion or opportunity for the commission of the offence "

In *Baijnath* v. *State of M.P* [3], the majority doubted the correctness of the principle laid down in *Amrik Singh* v *State of Pepsu* [4], stating that they need not examine how far the decision in *Amrika Singh's case* [4], can stand in view of the earlier decisions of the Judicial Committee and the two subsequent decisions of a larger Bench of the Supreme Court in *Om Prakash* v *State of U P* [1], and *Satwant Singh* v *State of Punjab* [2]. In this decision, the majority approved the principles laid down in *Om Prakash* v *State of U P.* [1], and *Satwant Singh* v *State of Punjab* [2], and held that the act of criminal misappropriation was not committed by the appellant while he was acting or purporting to act in the discharge of his official duty and that the offence had no direct connection with the duties of the appellant as a public servant and the official status of the appellant only furnished the appellant with an occasion or opportunity for the commission of the offence

The latest decision by the Supreme Court in *Arulswami* v *State of Madras* [5], arose from a Madras case under the Madras Village Panchayats Act. The Supreme Court in that case was concerned in the interpretation of section 106 of Madras Act X of 1950 which is *in pari materia* with section 169 of Act XXXV of 1958 In that case, the President of the Narinjipet Panchayat Board was prosecuted under section 409, Indian Penal Code It was alleged that the appellant cashed a sum of Rs 4,000 of the Panchayat Board invested in National Plan Savings Certificates in the Bhavani Post Office and did not bring the amount into the account books of the Panchayat Board The defence was that the appellant signed the certificates, and handed them over to the Deputy Panchayat Officer and that he did not appropriate the amount The Supreme Court held in the circumstances of the case that no sanction was necessary under section 106 of the Madras Village Panchayats Act. In this decision, the principles laid down in the earlier decisions in *Om Prakash* v. *State of U.P* [1], *Satwant Singh* v *State of Punjab* [2], and *Baijnath* v *State of M P* [3] were approved

The trend of the decisions of the Supreme Court appears to be that (1) it is not every offence committed by a public servant that requires sanction for prosecution; (2) Nor even every act done by him while he is actually in the performance of his

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1 (1957) S C J 289 : (1957) M L J (Crl.) 237 A I R 1957 S C 458

2 (1960) S C J 863: (1960) M L J (Crl.) 603 A I R 1960 S C 266 at 271

3 (1965) 2 S C J 478 : (1965) M L J. (Crl) 676 . A I R 1966 S.C 220

4 (1955) S C J 334 (1955) 1 M.L J. (S C.) 198 A I R 1955 S C 309

5 (1967) 2 S C J 1 (1967) 1 S C R 201 (1967) 2 M L J (S C) 26 (1967) M L J (Crl.) 483 (1967) 2 An W R (S.C) 26 A I R. 1967 S C. 776

official duties, and (3) Sanction would be necessary if the act complained of is strictly concerned with his official duties, so that it could be claimed to have been done by virtue of the office.

Applying the principles laid down by the Supreme Court to the facts of this case, I am of the view that it cannot be said that the criminal breach of trust or misappropriation committed by the revision petitioner was while he was acting in the discharge of his official duties, and hence no sanction is necessary

The next question whether the sanction accorded by the Collector was valid or not does not arise It appears Kailasam, J, in *Public Prosecutor* v *Arulswami*[1], held in dealing with the powers of delegation under section 127 of Madras Act X of 1950 which is *in pari materia* with section 157 (1) of Madras Act XXXV of 1958 that the Government can delegate its powers of sanction to the Collector *Prima facie*, I am inclined to agree with Kailasam, J.

The revision petition is, therefore, dismissed The Magistrate is directed to dispose of the case according to the law as expeditiously as possible

S.V J. *Revision petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE A ALAGIRISWAMI

Amir Jan .. *Appellant**

v.

Shaik Sulaiman Sahib and others *Respondents*

Trust property—Alienation by trustee—Suit by worshipper for possession—Maintainability of

There is no doubt that even a worshipper will be entitled to maintain a suit for possession of a trust property where the trustee has alienated the trust property and would not proceed to recover possession of the same or has disabled himself otherwise from maintaining a suit in respect thereof, or declines to institute a suit The worshippers are in that case entitled to maintain a suit for preserving the trust property or restoring the property to the trust either by instituting a suit for declaration or for an injunction or even for possession If the suit is one brought for possession by the worshippers, the Court can, after declaring the property to be trust property and setting aside the alienation, direct delivery of possession to the trustee In cases where there is no trustee, it is open to the Court to direct delivery of possession to the worshippers on behalf of the trust There is ample authority for the position that where the trust property has been alienated by the trustee and is in wrongful possession of a trespasser, it is open to any worshipper to maintain a suit even for possession, if there is no lawful trustee.

(On facts held that there is no lawful trustee and the third defendant who was appointed as Muthavalli by the Wakf Board cannot be deemed to be the managing trustee because he is himself the alienee of the trust property. The plaintiff is, therefore, entitled to a decree for possession of the suit property on behalf of the trust)

Appeal against the Decree of the Court of the Subordinate Judge of Tirunelveli in Appeal Suit No 135 of 1962, preferred against the Decree of the Court of the District Munsif, Tirunelveli in Original Suit No 121 of 1961.

V. Ratnam, for Appellant

T K Subramania Pillai and *R. Shanmugham*, for Respondents

The Court delivered the following

JUDGMENT —The appellant in this case is the plaintiff The suit relates to a wakf property The wakf was created by one Shaik Hussain under a document,

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1 (1964) 2 M L J 184 I L R (1964) 2 Mad 190. (1964) M L J. (Crl) 521 : A I R. 1964 Mad 350.

*S.A. No. 242 of 1964. 1st December, 1967.

Exhibit A-1 dated 19th February, 1904 Under this document, Shaik Hussain provided that his three sons Sheik Ismail, Mohamed Hussain and Abdul Gafoor were to be joint trustees after him Defendants 4 and 5 are the sons of Sheik Ismail and Mohammed Hussain respectively and the plaintiff is the son of Abdul Gafoor. The fourth defendant executed two possessory mortgages, Exhibits B-9 and B-32 to one Subramaniam over the property This Subramaniam assinged the othi to one Palavesa, who in turn assigned it to the first defendant The first defendant created a othi of his othi right in favour of one Burhan Ali, who has assigned it under Exhibit B-33 to the second defendant, who is first defendant's wife The third defendant is a vendee from the fourth and fifth defendants of the wakf property under Exhibit B-7 dated 14th April, 1950 and Exhibit B-5 dated 24th February, 1949, respectively The plaintiff filed the suit out of which the second appeal arises for possession of the wakf property on the ground that it had been wrongly alienated by defendants 4 and 5. The trial Court held that though the othi in favour of defendants 1 and 2, was not valid by itself, defendants 1 and 2 have prescribed for their rights as mortgagees by adverse possession and that, therefore, that is a othi binding on the wakf, but as regards the alienation in favour of the third defendant, the trial Court held that it was not valid or binding and that the plaintiff was entitled to possession of the property The plaintiff did not appeal against the decree of the trial Court in so far as it held that defendants 1 and 2 had obtained title as mortgagees by adverse possession But the third defendant alone appealed and the lower appellate Court has held that while the plaintiff as a worshipper is entitled to maintain the suit, he was not entitled to maintain a suit for possession In effect, it held that the mortgages in favour of defendants 1 and 2 were binding, that the alienation in favour of the third defendant is not valid or binding, that the plaintiff though entitled to maintain a suit for declaration, was not entitled to file a suit for possession, that the plaintiff is not a Muthavalli and only a Muthavalli appointed by Court could get a decree for possession It also held that as the property was under a mortgage, there was no urgency about a decree for possession In so far the lower appellate Court held that the plaintiff is not a Muthavalli, it is undoubtedly correct; nor are defendants 4 and 5 Muthavallis Alienations by defendants 4 and 5 in favour of the third defendant are therefore clearly invalid and not binding on the trust. Unfortunately nothing can be done about the othi in favour of defendants 1 and 2 at this stage as the plaintiff did not file any appeal with regard to that

But there is no doubt that even a worshipper will be entitled to maintain a suit for possession of a trust property where the trustee has alienated the trust property and would not proceed to recover possession of the same or has disabled himself otherwise from maintaining a suit in respect thereof, or declines to institute a suit. The worshippers are in that case entitled to maintain a suit for preserving the trust property or restoring the property to the trust either by instituting a suit for declaration or for an injunction or even for possession If the suit is one brought for possession by the worshippers, the Court can, after declaring the property to be trust property and setting aside the alienation, direct delivery of possession to the trustee. In cases where there is no trustee, it is open to the Court to direct delivery of possession to the worshippers on behalf of the trust. It has been so held in the decision in *Rengasami Naidu* v. *Krishnaswami Aiyer*[1] This has been followed in the decision in *Ahmed Kutty* v *Ayithraman Kutty*[2] In fact, in *Zafaryab Ali* v *Bakthawar Singh*[3], a relief by way of an injunction for removal of a building was granted in respect of a mosque property In *Muhammad Alam* v *Akbar Hussain*[4], the learned Judges cite the decision in *Zafaryab Ali* v *Bakthawar Singh*[3], with approval and also a passage of Ameer Ali in his work on Mohamedan Law, where the learned Author observes :

"Every Mahomedan who derives any benefit from a wakf or trust is entitled to maintain an action against the Mutawalli to establish his rights thereto, or against

1 (1923) 44 M L J 116
2 (1937 2 M L J 301 A I R 1937 Mad 819.
3 I.L.R (1883) 5 All 497
4 (1910) I.L.R. 32 All. 631.

the trespasser to recover any portion of the wakf property which has been misappropriated "

In *Fahimul Huq* v *Jagat Ballav*[1], it was observed thus :

" It is now well settled that a beneficiary of a trust in respect of a Mohamedan wakf interested in the maintenance of a mosque or other charitable institution may, without having recourse to the provisions of rule 8, Order 1, Civil Procedure Code, and without other beneficiaries, sue for recovery of possession of property wrongfully alienated by the trustee and for the incidental declaration that the properties are the subject of the trust and that they cannot be alienated "

The same view was taken in *Ashraf Ali* v *Muhammad Nurajjama*[2] This Court has held in *Subramania Iyer* v *Nagaratna Naicker*[3], that it is competent to a worshipper to maintain a suit in ejectment against the alienee in possession of the trust property and direct delivery of possession of the trust property to the trustee after declaring the alienation invalid. Discussing this case Venkataramana Rao, J , in *Ahmed Kutty* v. *Ayithraman Kutty*[4], has observed as follows —

" The principle underlying such a suit has been that the suit is really on behalf of the trust and the worshippers must be deemed to be suing in right of the trustee as pointed out in *Chidambaranatha Thambiran* v *Nallasiva Mudaliar*[5], but in cases where possession cannot be awarded to the plaintiffs on the ground that there is a lawful trustee and that such a trustee has not been made a party to the suit, the suit cannot be dismissed, for other reliefs can be granted, for example, a declaration that the property is trust property , vide *Kaji Hassan* v *Sagun Balakrishna*"[6]

Thus there is ample authority for the position that where the trust property has been alienated by the trustee and is in wrongful possession of a trespasser, it is open to any worshipper to maintain a suit even for possession, if there is no lawful trustee In this case, there is no lawful trustee and the third defendant who was appointed as Muthavalli by the Wakf Board cannot be deemed to be the managing trustee because he is himself the alienee of the trust property The plaintiff is, therefore, entitled to a decree for possession of the suit property on behalf of the trust. But, unfortunately, he cannot get possession because the Courts below have held that there is a valid possessory mortgage over the property and that decision stands It is, therefore, open to the plaintiff to redeem the mortgage and get possession Similarly, any trustee that might be appointed either by the Court, or by the Wakf Board, can get possession of the property by redeeming the mortgages

The appeal is, therefore, allowed in part and there will be a decree for redemption and possession in favour of the plaintiff on behalf of the trust Defendants 3, 4 and 5 will pay the costs of the appellant

No leave.

S V.J.

Second appeal allowed in Part , No Leave.

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1. (1923) I L R 2 Pat 391
2 (1919) 23 C W N. 115
3 (1910) 20 M.L J. 151.
4. (1937) 2 M.L J. 301 : A.I.R. 1937 Mad. 819
5. (1918) 33 M L J 357 : (1918) I L.R. 41 Mad. 124 at 135.
6 (1899) I L R. 24 Bom. 170.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE M M. ISMAIL

T K. Saravana Perumal .. *Appellant**

v.

Shishikana Perumal . *Respondent*

Special Marriage Act (XLIII of 1954), *sections* 27 *and* 35—*Divorce on the ground of cruelty—When may be granted—What amounts to cruelty—Finding of trial Judge in cruelty cases—Interference with by appellate Court—Practice.*

The totality of the circumstances disclosed by the evidence of the parties should be taken into account for the purpose of determining whether cruelty has been established or not. At the same time it should not be forgotten that as pointed in *Gollins* v. *Gollins*, L R. (1964) A C 644, cruelty is a matrimonial offence and an allegation of cruelty is a serious one To be found guilty of cruelty involves not only a slur which would be deeply wounding to any self-respecting person but also involves certain specific consequences The matters complained of as amounting to cruelty must therefore extend much beyond the trivial or the casual They must be serious matters If they were not they surely could not be the foundation for an order affecting the matrimonial relationship The party seeking relief must show actual or probable injury to life, limb or health

Along with this fact, another factor that has to be borne in mind is the necessity for maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down

Case-law discussed.

It has been the considered view of the highest Courts in England that in cruelty cases, the finding of the trial Judge, who had the opportunity of seeing the parties and observing their demeanour when they were giving evidence before him, ought not to be interfered with unless they can be said to be clearly wrong

In the instant case, taking into account the fact that the appellant (husband) and the respondent (wife) hail from two different States, speaking different languages, may be accustomed to somewhat different ideas and notions on various aspects of life, that the marriage between the parties was solemnised contrary to the wishes of the parents of the appellant and was an inter caste marriage, that by education and attainments the parties cannot be said to be very liberal and progressive in their outlook as disclosed by the evidence with reference to the mother of the appellant having recourse to mantrams for the purpose of getting rid of the respondent and the appellant himself doing some mantrams and pooja with the respondent's photo before him, that the financial and enconomic position of the appellant has not been very comfortable, that most of the incidents complained of are trivial in nature and that divorce cannot be founded on mere trivialities and incompatibility, it has to be held that even the entire evidence taken as a whole does not establish the case of cruelty. The incidents disclosed by the evidence do not go well beyond the ordinary wear and tear of married life and do not establish cruelty so as to attract the matrimonial jurisdiction of the Court

Appeal against the order of the City Civil Court (Additional Judge), Madras, dated 17th December, 1962 and made in O P. No 105 of 1961

N S. Raghavan, for Appellant

M V Venkatesan, for Respondent

The Court delivered the following

JUDGMENT :—This is an appeal against the order of the learned Additional Judge, City Civil Court, Madras, dismissing the application filed by the appellant herein,

*A A O No 115 of 1963 19th December, 1967.

under section 27 of the Special Marriage Act, for a decree of divorce, on the ground that the respondent has treated the appellant with cruelty

The appellant herein was first appointed as a Lower Division Clerk in the year 1943 at Poona and later was transferred to the Local Audit Office at Bombay At the time of the petition, he was employed in the Military Accounts Department, Government of India, as an auditor in the Local Audit, Defence Accounts Department. While the appellant was working at Bombay, on 2nd April, 1953 the marriage between the appellant who hails from Madras, and the respondent who hails from Bengal, was solemnised under the Special Marriage Act (III of 1872), since repealed by Act XLIII of 1954, and the marriage was registered at the office of the Registrar of Marriages, Bombay, on that date The appellant and the respondent have two daughters aged 8 and 6 in 1961, now aged about 14 and 13 respectively.

According to the allegations contained in the petition filed by the appellant, after the marriage the appellant and the respondent were living in Bombay for sometime; while so, the respondent ignoring the dislike of the appellant took to insurance job as a representative of the Life Insurance Corporation of India; the respondent habitually conducted herself towards the appellant with great harshness and cruelty, very frequently abusing him in the most insulting language, used to beat him with whatever she could lay hands upon, and was making the life of the appellant very miserable, there were several occasions at Bombay where the appellant and the respondent were living till about 1956, when frequent complaints were made and recorded in the Colaba Police Station, in 1955 the respondent filed a petition under section 488, Criminal Procedure Code, against the appellant on the file of the XVI Presidency Magistrate's Court, Bombay, while she was living with the appellant, and the said complaint was rejected by the Magistrate on 26th April, 1956 on her own admission that she was living with the appellant; there used to be complaints by neighbours about the respondent to the officers of the appellant about the conduct of the respondent, the appellant's stay at Bombay was made intolerable by the frequent quarrels of the respondent; the appellant's life was made miserable by the frequent quarrels which the respondent had with the neighbours of the appellant also; even when the appellant was transferred to Poona in 1956, she was practically living her own there, without least regard to the appellant's wishes, in or about April, 1960, the appellant was transferred to Madras and at that time the respondent would not accompany him to Madras, but promised to join him later, after coming to Madras, the appellant fixed up a residence for living in a portion of No. 75, Pidariar Koil Street, G T, Madras, and after much of correspondence the respondent joined him in or about the middle of May, 1960; soon after she joined the appellant, the respondent began her old ways of quarrels with the appellant, fisting him and assaulting him and also always quarrelling with the neighbour, with the result life was intolerable to the appellant; one day after Pongal, the respondent fisted the appellant and caused injuries to his person and the neighbours had to intervene and the appellant finding that his continuing to stay with her being detrimental to his life, had to seek refuge of his father, where he was staying at the time when he presented the petition to the Court, on or about 2nd February, 1961, without the least provocation from the appellant, the respondent picked up a quarrel and inflicted injuries on the appellant and by reason of such continued cruelty practised towards him, the appellant had to withdraw himself from the house No. 75, Pidariar Koil Street, and stay with his father at No 36, Nattu Pilliar Koil Street The appellant further stated that he has already taken custody of the first daughter and he wanted the custody of the second daughter also. On these allegations, in February, 1961, the appellant filed the petition referred to above, under section 27 of the Special Marriage Act, 1954, praying for a decree for the dissolution of the marriage between the appellant and the respondent, for a decree granting divorce and for the custody of the child

The respondent in the counter filed by her denied the allegations of the appellant. She contended that it was the appellant who asked her to take up the insurance job as a *benami* for him to supplement the family income and that the insurance business was really done by him She further stated that the various allegations

made by the appellant against her were false and were mere inventions to cover up his desertion of the respondent. Her case was that the marriage of the appellant with the respondent was solemnised against the wishes of the appellant's parents and consequently the parents of the appellant were hostile to her and they were influencing the appellant to desert her She alleged that when she conceived for the second time, the appellant advised her to have abortion and when she refused to listen to that advise, he began to desert her and treat her with cruelty, he failed to give any money for the respondent for domestic expenses and he never cared to visit the house in time and even absented from the house during nights and did not care for the well-being of the children and the respondent and it is under these circumstances she filed the petition under section 488, Criminal Procedure Code, before the Magistrate at Bombay and the Magistrate advised the appellant to take care of the respondent properly and also advised him to behave like a worthy husband The further case of the respondent was that even in 1955 the appellant tried his best to get rid of the respondent by deserting her and without the knowledge of the respondent he tried through some of his relatives to get a transfer from Bombay to Madras, sometime in June, 1955, with the idea of leaving behind the respondent in Bombay. But when she came to know of it she rushed to the Controller of Southern Command, Poona, under whom the appellant was working, and begged of him not to dislocate her life and the lives of the two children by transferring the appellant and the Controller was generous enough to cancel the transfer order With regard to the allegation of the appellant that when he was transferred to Madras in or about April, 1960, the respondent did not accompany him, her case was that it was the appellant himself who asked the respondent to stay back for sometime, since the appellant had owed some debts and even the rent for the house in which they were living was in arrears and if the respondent also left Poona along with the appellant, the creditors and the landlord would insist upon their debts being discharged immediately and over and above that the appellant did not have sufficient money for the travelling expenses of both and it was under those circumstances he alone came to Madras and asked her to stay in Poona for sometime, promising that he would remit money for her to make her trip Contrary to that, the appellant did not send any money and consequently the respondent had to come to Madras and find out the appellant with the help of the police According to the respondent, after she came to Madras, the appellant and the repondent lived along with the parents-in-law of the respondent for sometime; later due to the cruel treatment meted out to the respondent by her mother-in-law and others she had to request her husband to find out some accommodation elsewhere The mother of the appellant started giving all troubles to the respondent and also went to the extent of beating her and also inciting the neighbours and others to find fault with her and all these were done deliberately with the object of the appellant deserting the respondent The respondent further proceeded to state that even after they moved to a separate residence at No 75, Pidariar Koil Street, Madras, the appellant under the influence of his parents began to desert the respondent by not giving any money for domestic expenses and by not visiting the house regularly and the mother of the appellant even went to the extent of having recourse to *mantras* and other devices thinking thereby that they could threaten the life of the respondent and the appellant fell a victim to the bad influence and the manoeuvres of the mother The respondent further alleged that the appellant completely stopped paying any money to the respondent from December, 1960 and took away the eldest daughter in her absence on 28th January, 1961 when the respondent was attending on her younger daughter who was lying sick in the hospital. The respondent also alleged that the appellant came late in the night and on being asked he got enraged and beat the respondent She wound up her counter by stating that she has always been willing to live with the appellant

Before the learned Additional Judge, City Civil Court, Madras, the appellant examined himself as P.W 1 and one Ananthasayanam, landlord of No. 75, Pidariar Koil Street, where the parties lived, was examined as P W. 2, and the respondent herself was examined as R.W. 1. After considering the evidence placed before him, the learned Additional Judge came to the conclusion that the insurance business was

done really by the appellant in the name of the respondent, since he himself was a Government employee and consequently could not carry on the business in his own name. He also came to the conclusion that there was no evidence as to the attitude and the conduct of the respondent being cruel to the appellant, when they were living at Bombay and Poona. He further came to the conclusion that with regard to the several allegations as to the late coming of the respondent to the house, no such thing was established and even the evidence of P W. 2 indicated that she was not coming late to the house and on the other hand it was the appellant who was coming late to the house With regard to the allegation of the appellant that the respondent used to beat him with whatever she could lay hands upon and fist him, the learned Judge refused to place any reliance upon the evidence of the appellant and even with regard to the evidence of P W 2 who claimed to have seen the parties beating each other on one occasion, he came to the conclusion that at any rate the evidence was not satisfactory enough to prove such beating by the respondent of the appellant was such as to constitute cruelty for granting a divorce. With regard to the case of the appellant that the respondent did not accompany him on his transfer to Madras from Poona, the learned Judge accepted the version of the responden and held against the appellant. Referring to the case of the appellant wherein he had alleged that on one occasion when he was studying for an examination, the respondent threw water on him, the learned Judge held that that incident, though admitted by the respondent was explained by her by stating that late at night the appellant was having the respondent's photo and was chanting some *mantras* and getting frightened she threw water on him and she also stated that on another occasion the appellant asked her to hold a stick tied with a cloth and that she refused to do so The learned Judge expressed his view that these silly matters in his opinion did not amount to legal cruelty, with the result he dismissed the appellant's petition with costs It is against this order of the learned Additional Judge, City Civil Court, Madras, the appellant has filed the present appeal

Mr. N. S. Raghavan, learned Counsel for the appellant, put forward before me the following contentions: (1) From the admission of the respondent that on one night she came home late and on another night she threw water on the appellant, the learned Judge must have found the case for the appellant (2) Even if each and every one of the incidents spoken to by the parties cannot be said to constitute cruelty still the totality of the circumstances as disclosed by the evidence established cruelty so as to justify the grant of a decree for divorce. (3) In any event, the respondent herself having put forward the case that she was treated with cruelty by the appellant, under section 35 of the Special Marriage Act, 1954, the learned Additional Judge ought to have granted a decree for divorce

Before I deal with these contentions, it is necessary to refer to certain general principles which should govern the consideration and the decision of a case of cruelty constituting the ground for the grant of divorce Mr N S Raghavan, learned Counsel for the appellant, drew my attention to the head-note of the decision *Crawford* v. *Crawford*[1]. The head-note which is relied on by the learned Counsel is as follows —

" In relation to cases of mental cruelty, the authorities lay down the following principles : (*i*) cruelty may be inferred from the whole facts and atmosphere disclosed by the evidence; (*ii*) actual intention on the part of the husband to injure the wife is an important but not an essential factor; (*iii*) it is impossible to create categories of acts or conduct which do or do not amount to cruelty; (*iv*) sexual offences directly relevant to the husband's conjugal obligations may constitute ill-treatment of the wife; (*v*) mental ill-treatment may be coupled with physical ill-treatment in order together to found a charge of persistent cruelty.

Since mental and physical ill-treatment can, though they are not *ejusdem generis*, be taken together, it must follow (vi) that different forms of mental ill-treatment may be taken together in order to found a charge of persistent cruelty "

1. (1953) 3 A.E.R. 592.

The head-note relied upon by the learned Counsel merely refers to certain general principles and guidance that should be followed in assessing the evidence in a particular case so as to find out whether the evidence disclosed cruelty constituting the matrimonial 'offence' As a matter of fact, the entire law in this behalf has been recently surveyed very elaborately by the two decisions of the House of Lords in *Gollins* v. *Gollins*[1], and *Williams* v *Williams*[2] and these decisions merely refer to certain guiding principles to be followed by the Courts for the purpose of determining whether in a particular case the materials placed before the Court established " cruelty " for the purpose of granting a relief in the exercise of the Matrimonial Jurisdiction of the Courts In *Gollins* v *Gollins*[1], Lord Reid stated

" No one has ever attempted to give a comprehensive definition of cruelty and I do not intend to try to do so Much must depend on the knowledge and intention of the respondent, on the nature of his (or her) conduct, and on the character and physical or mental weaknesses of the spouses, and probably no general statement is eqully applicable in all cases except the *requirement that the party seeking relief must show actual or probable injury to life, limb or health* "

It is easy to see that the origin of this requirement is the decision in the well-known case of *Russel* v. *Russel*[3]

The law in this behalf has been enunciated in the following terms in paragraph 79 of Rayden on Divorce, Ninth Edition:

" 'Legal cruelty' may be defined as conduct of such a character as to have caused danger to life, limb or health (bodily or mental) or as to give rise to a reasonable apprehension of such danger Where conduct over a period of years is relied on as constituting cruelty, it is very difficult to prove to the satisfaction of the Court that there was reasonable apprehension of danger to health where actual injury is not proved The fact that a marriage has broken down is no reason in itself for a finding of cruelty"

Again, it must be remembered that as pointed out by Lord Pearce in *Gollins* v. *Gollins*[1] :

" Marriage by its nature causes one party to be affected by most of the reprehensible conduct on the part of the other, and usually it is obvious that it will be so," and

" In many marriages there are many complaints that could be put forward by either party, but that only grave and weighty matters causing injury or apprehended injury to health will suffice to support a charge of cruelty "

His Lordship further observed

" It is impossible to give a comprehensive definition of cruelty, but when reprehensible conduct or departure from normal standards of conjugal kindness causes injury to health or an apprehension of it, it is, I think, cruelty if a reasonable person, after taking due account of the temperament and all the other particular circumstances would consider that the conduct complained of is such that this spouse should not be called on to endure it. . . . .

I agree with the Lord Merriman whose practice in cases of mental cruelty was always to make up his mind first whether there was injury or apprehended injury to health In the light of that vital fact, the Court has then to decide whether the sum total of the reprehensible conduct was cruel That depends on whether the cumulative conduct was sufficiently weighty to say that from a reasonable person's point of view, after a consideration of any excuse which this respondent might have in the circumstances, the conduct is such that this petitioner ought not to be called on to endure it . . . .

The particular circumstances of the home, the temperaments and emotions of both the parties and their status and their way of life, their past relationship and

1. L R. (1964) A.C. 644.
2 L.R. (1964) A.C. 698.
3. L R. (1897) A C. 395.

almost every circumstance that attends the act or conduct complained of may all be relevant "

Lord Normand in *Jamieson* v *Jamieson*[1], observed

" My Lords, I think that it does not do justice to the averments to take up each alleged incident one by one and hold that it is trivial or that it is not hurtful or cruel and then to say that cumulatively they do not amount to anything grave, weighty or serious "

In the same case Lord Tucker stated

" Every such act must be judged in relation to its attendant circumstances, and the physical or mental condition or susceptibilities of the innocent spouse, the intention of the offending spouse and the offender's knowledge of the actual or probable effect of his conduct on the other's health (to borrow from the language of Lord Keith) are all matters which may be decisive in determining on which side of the line a particular act or course of conduct lies."

To the similar effect is the observation of Lord Reid in *King* v *King*[2], where his Lordship had stated :

" I do not intend to try to define cruelty I doubt whether any definition would apply equally well to cases where there has been physical violence and to cases of nagging, or to cases where there has been a deliberate intention to hurt and to cases where temperament and unfortunate circumstances have caused much of the trouble But in cases like the present, *the wife's conduct must at least be inexcusable after taking every thing into consideration* "

I am referring to this observation because that case also was one in which the husband applied for divorce on the ground of cruelty of the wife. In the same case Lord Asquith of Bishopstone stated:

" It is accepted that where cruelty is alleged the petitioner must prove two things. (1) That the acts were cruel; (2) that they damaged the petitioner's health "

Therefore, the learned Counsel for the appellant is right in contending that the totality of the circumstances disclosed by the evidence of the parties should be taken into account for the purpose of determining whether cruelty has been established or not. At the same time it should not be forgotten that as pointed out by Lord Morris of Borth-Y-Gest in *Gollins* v *Gollins*[3], already referred to,

" Cruelty is a matrimonial offence and an allegation of cruelty is a serious one. To be found guilty of cruelty involves not only a slur which would be deeply wounding to any self-respecting person but also involves certain specific consequences The matters complained of as amounting to cruelty must therefore extend much beyond the trivial or the casual They must be serious matters. If they were not they surely could not be the foundation for an order affecting the matrimonial relationship "

Along with this fact, another factor that has to be borne in mind is, as pointed out by Lord Simon in *Blunt* v. *Blunt*[4], the necessity for maintaining

" A true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down."

It is against the background of these basic and fundamental principles and considerations, the correctness and the validity of the contentions of Mr. Raghavan, the learned Counsel for the appellant, have to be determined It is true, as pointed out by him, the respondent admitted in her evidence that one night she came home at about 10-30 P M But she gave her explanation for coming so late, namely, the

1. L.R. (1952) A.C. 525.
2. L.R. (1953) A.C. 124.
3. L.R. (1964) A.C. 644.
4. L.R. (1943) A.C. 517.

illness of the second child. The learned Additional Judge, City Civil Court, Madras, had accepted that explanation of the respondent I do not see any justification to disagree with that view of the learned Judge. Again, she admitted that on one night she threw water on the appellant The appellant's evidence was vague and general in this behalf, as he stated, "she will throw water on me through the window and pour water on my head. (To Court This was at night and I was reading in my room within closed doors)" On the other hand, the evidence of the respondent was specific on this point. She stated, "I threw water on him through the window, as he was keeping my photo and doing mantrams I saw him doing some pooja I saw him doing after a bath late at night, after coming to Pidariar Street". This, the learned Judge has referred to and stated that he did not think that these silly matters can amount to legal cruelty. In my view, from this also no inference can be drawn against the respondent. This incident has to be appreciated against the background of the case of the respondent that it was under the evil influence of the mother of the appellant, the appellant was making every attempt to desert her and the appellant's mother had gone to the extent of having recourse to mantrams for the purpose of getting rid of her. It is the mental attitude of the parties that will have to be taken note of and if that was the idea she was entertaining, her action cannot be characterised as cruelty. The fact of the parents of the appellant having been opposed to the marriage of the appellant with the respondent from the very beginning and this incident happened after the parties came down to Madras, where the parents of the appellant are living lend support to the fear or the view entertained by the respondent Consequently, in my opinion, the first contention of Mr. Raghavan, the learned Counsel for the appellant, should fail

Even with regard to the second contention, I must point out that it has been the considered view of the highest Courts in England that in cruelty cases, the finding of the trial Judge, who had the opportunity of seeing the parties and observing their demeanour when they were giving evidence before him, ought not to be interfered with, unless they can be said to be clearly wrong. The judgment of the learned Additional Judge in this case indicates that he was prepared to accept the version of the respondent in preference to the version of the appellant, and he was justified in doing so, when it is remembered that with regard to two important incidents, namely, the taking up of the insurance business and the respondent having stayed behind without accompanying the appellant, when he came over to Madras on his transfer from Poona, the version of the appellant was found to be untrue and the version of the respondent was found to be true As a matter of fact, very properly, in view of the nature of the evidence available in this behalf, Mr Raghvan, learned Counsel for the appellant, did not advance any arguments before me challenging the finding of the learned Judge with reference to these two incidents Under these circumstances, it must be held that the appellant has failed to make out the case of cruelty on the part of the respondent

Even otherwise, taking into account the fact that the appellant and the respondent hail from two different States, speaking different languages, may be accustomed to somewhat different ideas and notions on various aspects of life, that the marriage between the parties was solemnised contrary to the wishes of the parents of the appellant and was an inter-caste marriage, that by education and attainments the parties cannot be said to be very liberal and progressive in their outlook, as disclosed by the evidence with reference to the mother of the appellant having recourse to mantrams for the purpose of getting rid of the respondent and the appellant himself doing some mantrams and pooja with the respondent's photo before him, that the financial and economic position of the appellant has not been very comfortable, as disclosed by the fact that he had to take up the insurance business in his wife's name to supplement his income, that most of the incidents complained of are trivial in nature and that divorce cannot be founded on mere trivialities and incompatibility, I am of the opinion that even the entire evidence in this case taken as a whole does not establish the case of cruelty, on the part of the respondent as alleged by the appellant and

the conduct of the respondent disclosed cannot be properly and rationally stigmatized as cruelty. As pointed out by Lord Asquith of Bishopstone in *King* v. *King*[1]:

> "The 'flash and outbreak of a fiery mind' is one thing, conduct which is designed to hurt the husband for the sake of hurting him is another".

In my opinion, the incidents disclosed by the evidence do not "go well beyond the ordinary wear and tear of married life" Therefore, I reject the second contention of Mr Raghavan, learned Counsel for the appellant

Regarding the third contention, section 35 of the Special Marriage Act, 1954 is as follows:

> "If in any proceeding for divorce, the respondent opposes the relief sought on the ground of the petitioner's adultery, cruelty or desertion, the Court may give to the respondent the same relief to which he or she would have been entitled, if he or she had presented a petition seeking such relief".

This section is identical in language with section 6 of the English Matrimonial Causes Act, 1950 which itself repealed the corresponding section, namely, section 180 of the Judicature (Consolidation) Act, 1925 In view of the limited scope of the submission made before me by Mr Raghavan, with reference to section 35, Special Marriage Act, it is unnecessary for me to decide anything with regard to the real scope of the section. Mr. Raghavan's contention is that the respondent herself having alleged cruelty on the part of the appellant, by virtue of section 35, the Court, in the exercise of its discretion, must grant the relief of divorce. Consequently, I shall have to consider whether the respondent complained of cruelty on the part of the appellant and established such cruelty, and secondly whether the Court should exercise its discretion and grant a decree for divorce As far as the first question is concerned, for the same reason which I gave with regard to the allegations made by the appellant, I am of the opinion that the respondent has not established cruetlty on the part of the appellant, so as to attract the matrimonial jurisdiction In view of this conclusion of mine on the first question, the second question does not arise. I must also further point out, as indicated by me already, that after stating her version of the case, the respondent stated in her counter that she has always been willing to live with the appellant. That, in any event, should be taken into account by the Court in the exercise of its discretion.

Under these circumstances, I agree with the conclusion of the learned Additional Judge, City Civil Court, Madras, and dismiss this appeal with costs Counsel's fee Rs 100

V K ——— *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE M M ISMAIL.

Tiruvannamalai Ammal .. *Appellant**

v

Sadasiva Mudali and others .. *Respondents*

Hindu Law—Joint family—Maintenance—Decree for maintenance obtained by wife of manager of joint family in a suit filed against him—Charge created over joint family property—Validity—If binding on coparceners not made parties to suit—Subsequent partition among members—Effect

Where in a suit filed by the wife of the manager of a joint Hindu family against her husband in his capacity as the manager, a decree for maintenance is passed, it will be binding on the entire joint family and a valid charge could be created

1. L.R. (1953) A C 124

*S A No. 1774 of 1963. 1st February, 1968

against the joint family properties for the maintenance claim The contention that the decree would not be binding on the coparceners who were not *eo nomine* parties to the suit or decree, is untenable.

Such a charge is not defeated by any subsequent partition effected among the members of the family It cannot be contended that by virtue of the fact that the members are seeking a partition of their shares from that of the manager, the maintenance decree could not thereafter operate against their shares and that the operation of the charge must be restricted only to the share of the manager of the joint family

Akki Dodda Basappa v *Akki Mallamma*, (1940) 1 M.L.J. 204. A.I R. 1940 Mad. 458, Relied on.

Appeal against the Decree of the District Court of Chingleput in Appeal Suit No 86 of 1962 preferred against the Decree of the Court of the District Munsif of Tiruttani in Original Suit No 84 of 1960

A. Ramachandran of *Row & Reddy*, for Appellant

Chandramouli for *T. R. Ramachandran*, for Respondents.

The Court delivered the following

JUDGMENT —The appellant is the second wife of one Sadasiva Subbaraya Mudaliar, the fifth respondent herein, whose sons through the third wife are respondents 1 to 4 herein The appellant herself has a son through the fifth respondent. She filed O S No. 27 of 1954 on the file of the Subordinate Judge's Court, Chittoor, as next friend and guardian of her minor son, for partition of his share and maintenance for herself. During the pendency of the suit, the appellant's son became a major and he settled his claim with the fifth respondent and obtained his share from the family properties, and the appellant herself withdrew her claim for maintenance with liberty to file a separate suit for that purpose. The appellant thereafter filed O S. No 13 of 1958 on the file of the Court of the District Munsif, Tiruttani, and on 31st August, 1959, she obtained a decree for maintenance at the rate of Rs. 15 per month and a sum of Rs. 10 per year towards clothing and the amount decreed in her favour was charged against certain items of joint family properties mentioned in that decree. Thereafter respondents 1 to 4 herein filed the present suit for partition of their 4/5ths share in the joint family properties impleading their father the fifth respondent and the appellant herein as defendants. In paragraph 7 of the plaint they contended as follows :

> " The plaintiffs after due enquiry have come to know that the second defendant had filed a pauper O.P.No. 21 of 1957 which was later numbered as O S No. 13 of 1958 in this Honourable Court against the first defendant alone for maintenance past and future and claims for separate residence and obtained a decree against the first defendant alone on 31st August, 1959 creating a charge over the plaint B schedule properties for the maintenance claim past and future Inasmuch as the plaintiffs were not impleaded as necessary parties by the second defendant in that maintenance suit O S No 13 of 1958, the decree creating a charge in the entire plaint schedule joint family properties in O S No 13 of 1958 will not bind the plaintiffs to the extent of their 4/5ths share in the said properties. The action of the second defendant in collusion with the first defendant in bringing the plaint B schedule properties to sale is highly illegal inasmuch as the plaintiffs' 4/5ths share in the plaint B schedule properties are concerned "

In the end the plaintiffs prayed for " a preliminary decree declaring that the plaintiffs are entitled the 4/5ths share in the plaint schedule mentioned properties ", for appointing a Commissioner to divide the plaint properties into five equal shares and to allot four such shares to the plaintiffs and to direct the defendants to deliver possession of such divided 4/5ths share to the plaintiffs or to take delivery of possession through process of Court Naturally the fifth respondent remained *ex parte* and the appellant alone defended the suit. Taking into account the pleadings of

the parties, the learned District Munsif framed five issues, the fourth of which is as follows :

"Whether the charge created in O S No 13 of 1958 is not binding on the plaintiffs' share in the properties ?"—

The learned District Munsif by his judgment and decree, dated 30th December, 1961 held that the charge created in O S No. 13 of 1958 was binding on the plaintiffs and passed a preliminary decree in favour of the plaintiffs subject to the charge created over their shares also in O S No 13 of 1958. Against this judgment and decree, respondents 1 to 4 herein preferred A S No 86 of 1962 on the file of the Court of the District Judge of Chingleput The learned District Judge came to the conclusion that the charge created in O S No. 13 of 1958 will not bind the shares of respondents 1 to 4 herein and in that view allowed that appeal preferred by them and modified the decree of the learned District Munsif so as to make it clear that the shares allotted to respondents 1 to 4 herein in the joint family properties will not be subject to the charge created in O S No 13 of 1958 in favour of the appellant herein It is against the judgment and decree the present Second Appeal has been filed.

The sole question that arises for determination in this appeal is whether the charge decree created in favour of the appellant in O S No 13 of 1958 stands automatically modified or is liable to be modified so as to affect only the share to be allotted to the first defendant in the present partition suit releasing the shares to be allotted to respondents 1 to 4 herein from the said charges.

Mr. A Ramachandran, the learned Counsel for the appellant, contended that the decree obtained by the appellant against the fifth respondent in O S. No. 13 of 1958 was obtained against him in the capacity of the manager of the joint family and the charge was created rightly against the joint family properties and that charge cannot be modified or restricted in the present proceedings The contention on the other hand of Mr Chandramouli, the learned Counsel for respondents 1 to 4 herein, is that respondents 1 to 4 herein were not *eo nomine* parties to O S No. 13 of 1958 and consequently they were not bound by the decree in that suit and their share of the joint family property was not affected by the charge created in that suit and in any event, once they filed the present suit for partition, there has come into existence a division in status as between them on the one hand and the fifth respondent on the other and under the Hindu Law, the liability to maintain the appellant being exclusively that of the fifth respondent, the charge must be deemed to operate only in respect of the share of the fifth respondent.

As far as the general principle of law is concerned either in relation to the competency of the first respondent to represent the entire joint family in O S No 13 of 1958 or in relation to the liability to maintain the appellant by the fifth respondent, there can be no doubt The legal position is stated thus in paragraph 253 of Mulla's Principles of Hindu Law, 13th Edition .

"It is not necessary, in order that a decree against the manager may operate as *res judicata* against coparceners who were not parties to the suit that the plaint or written statement should state in express terms that he is suing the manager or his being sued as a manager. It is sufficient if the manager is in fact suing or being sued as representing the whole family".

In respect of the liability to maintain a person like the appellant, the legal position is stated in the following terms in paragraph 543 of the Mulla's Principles of Hindu Law, 13th Edition :

"(1) The Manager of a joint Mitakshara family is under a legal obligation to maintain all male members of the family, their wives and their children. On the death of any one of the male members, he is bound to maintain his widow and his children The obligation to maintain these persons arises from the fact that the manager is in possession of the family property".

Admittedly on the date when the appellant filed O S No 13 of 1958, her husband, namely, the fifth respondent was a member and the manager of the coparcenary consisting of himself and respondents 1 to 4 with the result the fifth respondent in his capacity as manager of the joint family was under an obligation to maintain the appellant herein Therefore, the decree which the appellant obtained in O S. No 13 of 1958 was binding on the entire joint family and the charge created against the joint family properties was validly created even though respondents 1 to 4 herein were not *eo nomine* parties to that suit or the decree Hence the contention of respondents 1 to 4 herein that the said decree in O S No 13 of 1958 was not binding on them since the suit was filed only against the fifth respondent and they themselves were not *eo nomine* parties to the suit or to the decree, must fail

The next question for consideration is whether even if the decree in O S No. 13 of 1958 was validly passed and was binding on respondents 1 to 4 herein it can be contended by the respondents now that by virtue of the fact that they are seeking a partition of their shares in the property from that of the fifth respondent that decree could not hereafter operate against their shares in the property and the operation of the charge must be restricted only to the share of the fifth respondent Mr. Chandramouli appearing for respondents 1 to 4 herein relied on several decisions to show that the liability to maintain a wife is that of the husband alone and that too is based on the relationship existing between them as husband and wife and if any part of the property is liable for the maintenance of the appellant it is her husband's share in the property and they, namely, respondents 1 to 4 being only the step-sons of the appellant are under no obligation to maintain the appellant and consequently she cannot have any claim against the shares of respondents 1 to 4 for the purpose of enforcing her charge for maintenance The learned Counsel for the appellant did not dispute the general principles underlying this contention However, the limited question that arises in this case is whether the charge decree originally validly created in O S No 13 of 1958 thus automatically gets itself limited or restricted in its operation to the share of the property to be allotted to the fifth respondent, alternatively whether respondents 1 to 4 herein can claim any relief by way of asking for the amendment of the decree so as to make the charge effective only against the share of the fifth respondent On behalf of the appellant, a decision of a Bench of this Court in *Akki Dodda Basappa* v *Akki Mallamma*[1], was relied upon In that case, the plaintiff was the brother and the second defendant was son of the deceased husband of the first defendant The first defendant's husband died in or about 1918 leaving him surviving the first defendant, the second defendant his son by the first wife and the plaintiff his brother On the date of his death, the first defendant's husband was a member of the undivided family consisting of himself, the plaintiff and the second defendant In 1928 the first defendant filed a suit for maintenance and residence against the plaintiff and the second defendant and obtained a decree on 23rd January, 1929 by which the plaintiff and the second defendant were directed to pay maintenance at the rate of Rs 40 per month and the arrears of maintenance and the maintenance decree was made a charge on the property described in the schedule to the decree, which admittedly belonged to the joint family Subsequently the plaintiff and the second defendant effected a partition between themselves. Thereafter the plaintiff filed the suit contending that by reason of the said partition, the charge created in the earlier suit did not bind his share obtained at the partition He put his case in these terms in the plaint in the suit

> "Under Hindu Law defendant 1 is entitled to be maintained out of her husband's property and there is no such obligation against the plaintiff after the division of the joint family properties The decree in O S No. 3 of 1928 became inoperative after the division between plaintiff and defendant 2. The decree in O S No 3 of 1928 is against the joint family properties and there are no such properties now There is no personsl obligation on the plaintiff to maintain defendant 1 "

1 (1940) 1 M.L.J. 204. A I R 1940 Mad 458.

It will be seen that the case of the plaintiff in that suit was practically the same as that of respondents 1 to 4 in this case In dealing with the question whether the plaintiff in that case was entitled to file and maintain such a suit, this Court held that such a suit was not maintainable Before the learned Judges it was urged that by reason of the subsequent partition, the plaintiff was no longer bound to maintain the first defendant and the said decree obtained against him must therefore be declared inoperative, as the decree was a maintenance decree it was open to the plaintiff to institute a suit by reason of the events that happened subsequently to the date of the decree, that there was a change of circumstances which would necessitate the modification of the said decree, that it was competent to the Court to modify the same in view of the said change of circumstances and that the partition was such a subsequent event and under the Hindu law the obligation to maintain a widow was only from out of her husband's share and as the husband's share had now fallen to defendant 2 the proper person to maintain her was defendant 2, the plaintiff's obligation having ceased with the disruption of the family. The learned Judges of this Court came to the conclusion that such a contention was not tenable They observed

"When a member of an undivided family dies leaving him surviving his widow and his sons and brothers, her right to maintenance is against the entire joint family composed of the sons and brothers of the husband It may be that if she waits until a partition takes place she may have a lesser right, *i e*, instead of a right over the entire family, a right over those persons who take her husband's share. But if before a partition is effected, she gets her rights declared, defined and reduced to a certainty by a decree of Court, her rights cannot be taken away by any subsequent partition effected among the members of the family . . At the partition it is open to members to stipulate that the widow's maintainance may be paid by any one of the members as in this case by defendant 2 and that in default of payment the other members may have a right to contribution or indemnity against the person who under the partition was made liable to pay But that is an arrangement *inter se* between the members with which the widow has no concern

Where a widow has secured a charge on certain properties that charge is not defeated by any subsequent transfer of the said properties by the members of the family and she is entitled to enforce the charge in the hands of the transferee In our opinion partition would be a subsequent transfer and her charge is liable to be enforced in respect of the properties charged in whosoever's hands the properties may be We are, therefore of the opinion that the plaintiff is not entitled to the declaration sought"

In my opinion, this decision of this Court fully supports the contention of the appellant Mr Chandramouli, the learned Counsel for the respondents 1 to 4 sought to distinguish this decision on two grounds, namely, (1) in that case the plaintiff in the subsequent suit was *eo nomine* a party in the earlier suit, and (2) the charge was not created on the entire joint family property but only against a part of the joint family property With regard to the first point of distinction sought to be made, I have already indicated that the fifth respondent as manager of the joint family was entitled to represent the entire family and once a decree has been obtained against him in that capacity, that decree was binding on respondents 1 to 4 as well whether they were *eo nomine* parties or not Consequently, the fact that respondents 1 to 4 herein were not *eo nomine* parties in O S. No 13 of 1958 will not affect the principles of law applicable to the case The second point of distinction is also equally unsustainable The very decision referred to by me makes it clear thus

"In fixing the quantum of maintenance the measure has always been taken to be the husband's share but as observed in *Karuppan Kaundan* v *Chinna Nallammal*[1]

1 A.I R. 1927 Mad 1189

and also by Varadachariar, *J*, in *Ramarayudu* v *Sitalakshmamma*[1], the charge created in her favour need not be limited to the husband's share but in certain circumstances may exceed the husband's share."

Once the charge need not be restricted to the husband's shares and it can exceed the husband's share, there can be no valid distinction between a charge exceeding the husband's share and a charge created against the whole of the joint family property Therefore, I am of the opinion that the attempt made by Mr Chandramouli to distinguish the case referred to above from the case on hand fails.

Under these circumstances, I allow this appeal and set aside the judgment and decree of the learned District Judge and restore the judgment and decree of the learned District Munsif The parties will bear their respective costs throughout.

No leave.

V K. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE M M ISMAIL.

Anantha Pillai .. *Appellant**

v.

Rathnasabapathy Mudaliar and others .. *Respondents*

Power-of-attorney—Construction of—Principles.

Transfer of Property Act (*IV of* 1882), *sections* 53-A *and* 54—*Application of section* 53-A—*Necessary conditions—Person put in possession of property pursuant to an agreement to sell—No conveyance executed—Whether such person can establish his title on the basis of that agreement to sell itself*

Adverse possession—What constitutes—Agreement of sale—Vendee in possession—pursuant to such agreement—Execution of conveyance postponed—Whether vendee's possession adverse.

The general principles regarding the construction of a power-of-attorney are well-settled. Powers-of-attorney must be strictly construed as giving only such authority as they confer expressly or by necessary implication Where an act purporting to be done under the power-of-attorney is challenged as being in excess of the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument either by express terms or by necessary implication Some of the principles governing the construction of a power-of-attorney are : (1) the operative part of the deed is controlled by the recitals, (2) where an authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the performance of the particular acts, (3) the general words do not confer general powers but are limited to the purpose for which the authority is given and are construed as enlarging the special powers only when necessary for that purpose, (4) a power-of-attorney is construed so as to include all medium powers necessary for its effective execution There is no magic in the nomenclature of a power-of-attorney being a general power of attorney The scope of the power has to be gathered from the language of the document

(*Held on facts* that the power-of-attorney executed by Janaki Ammal in favour of the first defendant on 30th June, 1937 did not authorise the first defendant to execute Exhibit A-1 on behalf of Janaki Ammal and therefore the said document is not binding either on Janaki Ammal or the 2nd defendant.)

For the application of section 53-A of the Transfer of Property Act the following conditions must be cumulatively satisfied (1) there must be a contract to transfer immovable property for consideration ; (2) the contract must have been signed by or on behalf of the transferor, (3) the

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1 (1937) 46 M L J 550.

*S A. No 407 of 1965. 26th March, 1968.

terms can be ascertained with reasonable certainty from the document; (4) the transferee has to be in possession or, if he has been already in possession, continues in possession, (5) he has done some act in furtherance of the contract; and (6) the transferee has performed or is willing to perform his part of the contract. (*Held on facts* that the plaint does not contain any averment that the plaintiff is willing and prepared to pay the balance of consideration and that the plaintiff has not let in any evidence to show that he was ready and willing to perform his part of the contract Therefore, Condition No. (6) is not satisfied in this case and for this reason the plaintiff cannot have any reliance on section 53-A) *Held further*, that, in view of the provisions contained in section 54 of the Act, to hold that a person who has been put in possession of a property pursuant to an agreement to sell, in whose favour no conveyance has been executed, can establish his title on the basis of that agreement to sell itself, is to fly in the face of the provisions contained in section 54 of the Act and is to render the same clearly nugatory Hence, it is clear that the appellant cannot pray for a declaration of his title based upon section 53-A of the Act.

The concept of adverse possession contemplates a hostile possession, *i.e*, a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's rights, but denies them For deciding whether the alleged acts of a person constituted adverse possession, the animus of the person doing those acts is the most crucial factor. (*Held on facts*, that the plea of adverse possession taken by the appellant cannot prevail)

Appeal against the decree of the District Court, South Arcot, Cuddalore, in Appeal Suit No 374 of 1963, preferred against the decree of the Court of the Subordinate Judge, Cuddalore, in O S No 112 of 1961.

S. Rajagopala Iyer for *P. R. Gokulakrishnan* and *B Soundara Pandian*, Advocate, for Appellant.

B Lakshminarayana Reddy and *T. Narayanan*, for Respondents.

The Court delivered the following

JUDGMENT —One Chockalinga Mudaliar had no sons but had two daughters by names Janaki Ammal, wife of the first defendant, whose son is the 2nd defendant, and Kuppammal, the 3rd defendant, whose husband is the 4th defendant. This Chockalinga Mudaliar on 15th May, 1933, executed a will bequeathing all his properties to his two daughters who were minors on that date, though Janaki Ammal was married Under the terms of the will be authorised the 1st defendant, the husband of Janaki Ammal, to manage the properties and put Kuppammal in possession of her share of the properties on her attaining majority On 20th December, 1933, the suit properties were purchased under Exhibit B-1 in the name of Janaki Ammal and Kuppammal. On 30th June, 1937, Janaki Ammal executed a power-of-attorney in favour of her husband, the first defendant (Exhibit A-18) On 24th June, 1947 the first defendant executed an agreement, Exhibit A-1, in favour of the 5th defendant, who is the brother of the plaintiff, for selling the properties in the villages of Ozhundiampattu and Raya Oddai belonging to Janaki Ammal and Kuppammal for a consideration of Rs 7,500 and received an advance of Rs. 2,000 On 6th September, 1947, the first defendant received a further sum of Rs 1,000, and on 8th March, 1948 he received another sum of Rs. 1,000 making a total of Rs. 4,000 as advance pursuant to the agreement, dated 24th June, 1947. Kuppammal instituted O S No. 42 of 1954 on the file of the District Court, Cuddalore, which was transferred to and disposed of as O S. No 53 of 1956 on the file of the Court of the Subordinate Judge of Cuddalore, for partition of her one-half share in the suit properties as well as the other properties belonging to both the sisters. In that suit the plaintiff herein and the 5th defendant were impleaded as defendants 9 and 8 and they filed a written statement which has been marked as Exhibit A-16 in the present case That suit for partition was decreed and in that decree items 14 to 24 of the suit properties were allotted to the share of Kuppammal. Subsequent

to the decree in that suit on 1st January, 1957 in E P. R No 135 of 1956 in O S No. 53 of 1956 delivery of items 14 to 24 in favour of Kuppammal was recorded. Further an unregistered lease deed, dated 4th February, 1957 was also executed by the plaintiff in favour of Kuppammal. Subsequently on the ground that the plaintiff had committed default in payment of rents C R P No. 11 of 1959 was filed on the file of the Revenue Divisional Officer, and O.S. No. 474 of 1959 on the file of the District Munsif's Court, Tindivanam, was instituted for the recovery of arrears of rent. It must be pointed out that in 1955 Janaki Ammal died, and at that time O S No 52 of 1954 was pending. After the death of Janaki Ammal the first defendant and 2nd defendant were recognised as the legal representatives of Janaki Ammal and were brought on record as parties to that suit It is under these circumstances O S. No. 112 of 1961 was instituted on the file of the Court of the Subordinate Judge of Cuddalore by the plaintiff for declaration of his title in respect of the suit properties, which constitute 24 items and for permanent injunction restraining defendants 1 to 4 from interfering with his possession and for declaration that the decree in O S. No. 53 of 1956 on the file of the Court of the Subordinate Judge of Cuddalore was not binding on the plaintiff and for setting aside the decree. The plaintiff impleaded his father as the 6th defendant in the suit by putting forward the contention that, though Exhibit A-1 was executed in favour of the brother of the plaintiff, namely, the 5th defendant, it was really for the benefit of the joint family consisting of the 6th defendant, the father, and the plaintiff and the 5th defendant, the two sons, and therefore it was their right to the suit properties that was sought to be declared in the suit.

In the plaint, the plaintiff put forward the contention that the first defendant was the executor of the will of Chockalingam Mudaliar and he was also the guardian of Kuppammal, and Exhibit A-1 was executed by the first defendant in his capacity as the executor of the will of Chockalingam Mudaliar and as the power-of-attorney agent of Janaki Ammal and therefore that agreement was binding on both Janaki Ammal and Kuppammal. His further case was that ever since the date of Exhibit A-1, namely, 24th June, 1947 the plaintiff and the 5th defendant had been in possession of the suit properties and therefore they have perfected their title to the suit properties by adverse possession and consequently they are entitled to a declaration of their title to the suit properties. The further case of the plaintiff was that his title has become perfect under section 53-A of the Transfer of Property Act, since they have paid a sum of Rs 4,000 pursuant to Exhibit A-1 and also have been put in possession of the suit properties pursuant to the said agreement. The plaintiff stated that he was not aware of the decree in O S. No 53 of 1956, that during the pendency of the suit the first defendant approached the plaintiff and the 5th defendant and obtained their signatures on blank papers and assured them that he would look after their interest in the suit and if necessary he would file written statements on their behalf and have their rights defended It is only subsequently when the suit for the recovery of arrears of rent was filed they came to know that the first defendant fraudulently connived at passing of a decree for partition in favour of Kuppammal and therefore the decree in O S No 53 of 1956 was not binding on the plaintiff or the 5th defendant It may be noticed that the plaintiff claimed title to items 1 to 24 of the suit properties notwithstanding the fact that items 14 to 24 were allotted to the share of Kuppammal in the partition decree in O S No 53 of 1956 and the plaintiff had surrendered possession of those items to Kuppammal on 1st January, 1957 and executed a lease chit in her favour of 4th February, 1957

The first defendant filed a written statement resisting the claim of the plaintiff. He stated that he did not execute Exhibit A-1 either as executor under the will of Chockalinga Mudaliar or as power-of-attorney of Janaki Ammal Though he admitted the execution of Exhibit A-1 and the receipt of a sum of Rs 4,000 he contended that the rights of the 5th defendant under Exhibit A-1 was contingent upon the 1st defendant obtaining the sanction of the District Court for selling the properties of Kuppammal, who was a minor and whose Court guardian the first defendant was, and as soon as the Court refused to grant the sanction, the entire

agreement fell through. He also denied the allegation of the plaintiff that in O.S. No.53 of 1956, he obtained the signatures of the 5th defendant and the plaintiff on blank papers and used them for filing the written statements on their behalf The first defendant's case was that the plaintiff and the 5th defendant filed their own written statements in O S No. 53 of 1956, but remained *ex parte*, and allowed the decree for partition to be passed in the said suit However, the first defendant died during the pendency of the suit.

The 2nd defendant filed his own written statement A dmittedly the 2nd defendant was a minor on the date of the decree in O.S No 53 of 1956. He denied the execution of the agreement by the first defendant, the receipt of a sum of Rs 4,000 by the first defendant, and he also contended that there was no valid power-of-attorney in favour of the first defendant and that the power-of-attorney executed by Janaki Ammal in favour of the first defendant was not acted upon and was really abandoned within a short time after its execution.

The 3rd defendant also filed her written statement and she contended that in view of the proceedings in O S. No 53 of 1956 the plaintiff could not have any claim against her and in respect of items 14 to 24 of suit properties In other respects also she resisted the claim of the plaintiff.

The learned Subordinate Judge framed the necessary issues and by his judgment and decree, dated 15th April, 1963, came to the conclusion that the power-of-attorney executed by Janaki Ammal in favour of the first defendant did not clothe the first defendant with the power to enter into the agreement of sale, dated 24th June, 1947. Consequently, the learned Subordinate Judge came to the conclusion that the agreement was not binding on Janaki Ammal and therefore was not binding on the 2nd defendant The learned Subordinate Judge also came to the conclusion that the plaintiff and the 5th defendant were fully aware of the proceedings in O S No 53 of 1956 and they themselves have filed their written statements and that their allegation that the first defendant obtained their signatures on blank papers was not true. The learned Subordinate Judge also came to the conclusion that the plaintiff and the 5th defendant were fully aware of the proceedings in O S No 53 of 1956 and they themselves have filed their written statements and that their allegation that the first defendant obtained their signatures on blank papers was not true. The learned Subordinate Judge, with reference to the contention of the plaintiff that his title became perfect under section 53-A of the Transfer of Property Act, pointed out that the plaintiff never alleged in the plaint that he was willing to perform his part of the contract by paying the balance amount of Rs 3,500 and further section 53-A did not enable a person like the plaintiff to take the " sword " and ask for and obtain a decree declaring his title With regard to the claim of the plaintiff that the plaintiff and the 5th defendant had perfected title to the properties by adverse possession the learned Subordinate Judge rejected the same relying on certain decisions of the Courts referred to before him. He also came to the conclusion that Exhibit A-1 was entered into between the first defendant and the 5th defendant and therefore the plaintiff cannot take advantage of that agreement and maintain the present suit, with the result by his judgment and decree, dated 15th April, 1963 he dismissed the suit of the plaintiff.

The plaintiff thereafter preferred A S. No 374 of 1963 on the file of the Court of the District Judge of South Arcot, Cuddalore Before the learned District Judge the claim of the plaintiff against Kuppammal in respect of items 14 to 24 of the suit properties was not pressed, and the appeal was argued only against Janaki Ammal and her heirs and in respect of items 1 to 13 of the suit properties He substantially agreed with the conclusion of the learned Subordinate Judge and dismissed the appeal by his judgment and decree, dated 22nd October, 1964 In one respect he disagreed with the learned Subordinate Judge, namely, that he held that when the 5th defendant and 6th defendant came forward with the case that Exhibit A-1 was entered into for the benefit of the family itself, there was nothing to prevent the plaintiff maintaining the suit on the strength of the agreement It is against these judgments and decrees the present Second Appeal has been filed.

Mr. S. Rajagopala Iyer, learned Counsel for the appellant, at the very outset stated that the appeal is confined only to items 1 to 13 of the suit properties which were allotted to Janaki Ammal under the partition decree in O S. No. 53 of 1956 and the appellant no longer presses for the relief of setting aside the decree in that suit. The learned Counsel for the appellant put forward the following three contentions Firstly, the agreement, namely, Exhibit A-1, executed by the first defendant on 24th June, 1946 was as the power-of-attorney agent of his wife Janaki Ammal and therefore it was binding on Janaki Ammal and his heir, the 2nd defendant The contention of the learned Counsel is that the power-of-attorney, dated 13th June, 1937 authorised the first defendant to execute such an agreement Secondly by virtue of the provisions contained in section 53-A of the Transfer of Property Act and because of the fact that the plaintiff had paid Rs 4,000 to the first defendant towards the consideration of the proposed sale and was put in possession of the suit properties, he had acquired title to the suit properties and therefore he is entitled to the declaration prayed for Thirdly, in any event the plaintiff and the 5th defendant had perfected their title to the suit properties by adverse possession because of their continuous possession of the suit properties ever since 24th June, 1947.

I shall deal with these contentions of the learned Counsel in that order. Exhibit A-1 is in the following terms :

''மகா-ா-ஸ்ரீ வீரூணம் சாமிநாத பிள்ளை அவர்களுக்கு ராமசாமி முதலியார் எழுதிக் கொடுத்த வர்த்தமான லெட்டர்.

இப்பவும் புளிச்சம் பள்ளம் சொக்கலிங்க முதலியார் குமாரத்தி, ஜானகி அம்மாள், மைனர் குப்பம்மாள் இவாகளுக்கு பாத்தியமான அடியில் குறிப்பிட்ட கிராமத்தில் உள்ள நிலங்கள் பூராவும் (மாவடை, மரவடை உள்பட) ஆனால் சவுக்கு தோப்பு நீஙகலாக, மற்ற மரங்கள் தங்களுக்கு கிரயம் கொடுப்பதாக நிச்சயித்த ரூபாய் 7,500 (ஏழாயிரதது ஐந்நூறு) இந்த ரூபாய்க்கு இன்று தங்களால் ஷை கிரயததிறகு அடவான்சாக கொடுக்கப்பட்ட ரூபாய் இரண்டாயிரம் வரவு வந்திருககிறது. மிகுதியை கிரய பததிரகாலததில் தாங்கள் கொடுப்பதென்று நமக்குள முடிவுசெய்து கொண்டோம்.

இதில் மைனர் குப்பம்மாள் சம்பந்தப்பட்ட வரையில் தென்னாற்காடு ஜில்லா கோர்ட்டில் பாமிஷன் பெற்று நான் கிரயப்பததிரம் செய்து கொடுக்க வேண்டியிருப்பதால் அவ்வித பாமிஷன் பெற்று நான் தங்களுக்கு கிரயம் செய்துகொடுக்கிறேன்.

(ராமசாமி கையெழுத்து)

சொத்து விபரம்.

திண்டிவனம் தாலுக்கா ஒழுந்தியாம்—பட்டு 1, ராயஓட்டை 2 இந்த கிராமங்களிலிருக்கும் நஞ்சை, புஞ்சை நிலங்கள்.''

Certain features can be noticed in the above document There is no recital in that agreement that the first defendant was executing that agreement either in his capacity as the power-of-attorney agent of Janaki Ammal or as the guardian of Kuppammal The second feature is that the agreement expressly refers to the fact that to the extent to which Kuppammal was concerned, the sanction of the District Court of South Arcot, Cuddalore, has to be obtained for execution of the conveyance and therefore the conveyance will be executed after obtaining such sanction. The third feature is that a sum of Rs 2,000 was received by the first defendant as advance on the understanding that the balance of the consideration would be paid at the time of the execution of the conveyance The fourth feature is that the properties of Janaki Ammal and Kuppammal proposed to be sold were not described in detail except to state that all the properties in the two villages mentioned therein were proposed to be sold. The fifth feature is that a consolidated sum of Rs 7,500 was fixed as consideration for the properties proposed to be sold, which admittedly belonged jointly to Janaki Ammal and Kuppammal. The question that arises with reference to this agreement is whether it was binding on Janaki Ammal The first point that may be noticed is that the first defendant did not purport to execute it as agent of Janaki Ammal. That itself will be sufficient to show that the said document may

not be binding on Janaki Ammal However, I do not propose to rest my conclusion solely on this point In my opinion, even the power-of-attorney relied on by the learned Counsel for the appellant did not clothe the first defendant with the authority to enter into such an agreement. The power-of-attorney is a long and detailed one. Major portion of that power-of-attorney has been extracted by the learned Subordinate Judge in paragraph 19 of his judgment That power-of-attorney recites that it was being executed because of the inability of Janaki Ammal being a woman to manage her properties personally The various acts to be done by the first defendant are mentioned, *viz*, to collect the outstandings, to discharge debts if there were to be any due by the executant, to execute documents to others and to obtain documents from others. What can be seen immediately is that admittedly the document does not confer any specific or express power on the first defendant to sell, mortgage or otherwise alienate the properties of the executant However, there was one passage on which reliance was placed by the learned Counsel as conferring the power to enter into an agreement to sell or even to execute a sale deed. The relevant portion is as follows :—

> ''சகல விதத்திலும் எனக்குச் சேரவேண்டிய துகைகளை வசூல் செய்யவும், அவைகளுக்காக ரசீதுகள் கொடுக்கவும். என்னுடைய சொத்துக்கள் விஷயமாய் ரெவின்யூ ஆபீஸ்களிலாவது நியாயஸ்தலங்களிலாவது இதர இடங்களிலாவது செய்ய வேண்டியதாக அப்போதைக்கு அப்போது ஏற்படும் விவகாரங்களை எனக்காக நடத்தவும், என்னுல் இதராருக்கு கொடுக்கப்பட வேண்டிய பாக்கி இருக்கும் பட்சத்தில் எனக்காக அவைகளை கொடுத்து தீர்த்து ரசீது பெறவும், எனக்காக சகலவிதமான தஸ்தாவேஜுகளை அன்னியர்களுக்கு எழுதிக்கொடுக்கவும், அன்னியர்களால் எழுதி வாங்கவும்''.

The contention of the learned Counsel is that the power to execute documents on behalf of Janaki Ammal will include the power to execute an agreement to sell and also to execute a sale deed. In this connection the learned Counsel strongly relied on a sale deed executed by Janaki Ammal in favour of one Kuppuswami Naidu on 2nd June, 1953 as supporting his contention that the power-of-attorney executed by Janaki Ammal in favour of the first defendant contained the authority to enter into an agreement to sell That sale deed, dated 2nd June, 1953 expressly refers to the fact that earlier to that her husband as power-of-attorney agent of herself had entered into an agreement to sell and she was completing the transaction by executing the sale deed itself. That it was found necessary for Janaki Ammal personally to execute the sale deed, will be a sufficient indication to show that the parties themselves were aware of the fact that the first defendant did not have such a power Apart from that fact, that in one instance Janaki Ammal ratified the agreement to sell entered into by the first defendant and completed the sale by executing the deed of conveyance, does not establish that the power-of-attorney itself conferred such a power on the first defendant The general principles regarding the construction of a power-of-attorney are well-settled Powers -of-attorney must be strictly construed as giving only such authority as they confer expressly or by necessary implication. Where an act purporting to be done under the power-of-attorney is challenged as being in excess of the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument either by express terms or by necessary implication Some of the principles governing the construction of a power-of-attorney are . (1) the operative part of the deed is controlled by the recitals , (2) where an authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the performance of the particular acts ; (3) the general words do not confer general powers but are limited to the purpose for which the authority is given and are construed as enlarging the special powers only when necessary for that purpose, (4) a power-of-attorney is construed so as to include all medium powers necessary for its effective execution Bearing these general principles in mind the question for consideration is whether the power-of-attorney in this case authorised the first defendant to enter into an agreement to sell or authorised him to execute a sale deed. In my opinion the power granted to the first defendant to execute every type of document on behalf of Janaki Ammal will have to be understood with refer-

ence to particular acts specified in the documents itself, for which the power was granted It must be remembered that the power was granted by a wife to a husband for managing her properties and not for liquidating the same The apparent necessity for executing such a power was that being a woman she was not able to attend to the day-to-day requirements involved in the management of the properties and it is not as if she was not in a position to negotiate the terms of a sale or to execute a sale deed, which is not an every day occurrence Mr Rajagopala Iyer relied on the decision of this Court in *Venkataramana Iyer* v *Narasinga Rao*[1], and contended that the power-of-attorney in this particular case was a general power-of-attorney For the same purpose the learned Counsel relied on the decision of this Court in *Krishna Phoopathi Deo* v. *Raja of Vizianagaram*[2] I must point out that there is no magic in the nomenclature of a power-of-attorney being a general power-of-attorney. The scope of the power has to be gathered from the language of the document As was pointed out by this Court in the latter case relied on by the learned Counsel himself "Every document must be construed with reference to its particular terms, and differently worded documents afford but little assistance for correctly construing the document concerned in this case". Therefore, even on the basis that the power-of-attorney executed by Janaki Ammal on 30th June, 1937, is a general power-of-attorney, still the question remains whether it authorised the first defendant to execute a document like Exhibit A-1. Learned Counsel relied on a decision of the Calcutta High Court in *Narendra Nath* v *Bimala Sundari*[3], for the position that the agent's power is not limited to the physical act of signing documents relating to transactions entered into by the principals but he has also the power to enter into contracts himself on behalf of the principals and to make the necessary documents. In my opinion the question is whether any such power can be gathered from the terms of the document in question I am clearly of the view that no such power can be gathered from the document in question. One feature I have already indicated is that the document does not confer expressly on the first defendant any power to alienate the properties either by way of sale, mortgage or otherwise Secondly, the document is a detailed one referring to several acts to be done by the first defendant. Therefore, in the context of the detailed enumeration of the powers conferred on the first defendant to perform acts, the general words will have to be understood as enabling him to do such things as are necessary for the purpose of effectively performing those functions enumerated and conferred on the first defendant. Thirdly, the occasion for executing the power-of-attorney was that Janaki Ammal being a woman was not in a position to look after the management of her properties and affairs personally, and certainly that does not indicate any inability or disability on her part to negotiate a sale or enter into an agreement for that purpose. In this context a decision of the Patna High Court in *Loknath Prosad* v *Sah Wahib Hussain*[4] is instructive In that case a pardanashin lady executed a power-of-attorney in favour of her husband for the purpose of looking after her affairs and managing her properties. The power-of-attorney in that case began by reciting that the executant being a pardanashin lady it was difficult and impossible for her to look after and take care of the whole and entire village and Court affairs and cases and to execute every kind of deed personally It went on to appoint the husband as the general power-of-attorney with full powers and then specified in detail the powers in relation to village and Court affairs and to instruments affecting moveable and immoveable properties As to the latter powers, the language used after enumerating different kinds of deeds such as deeds of sale, mortgage and lease, etc was "the said general attorney shall either as (or through) attorney on his own behalf or personally on my behalf by his pen sign and acknowledge and get attested (these instruments) and present them before the Registrar and admit execution and get them registered." That is to say, the attorney had power to sign and consent to a deed of sale and get it attested and registered Notwithstanding this language, the Patna High Court pointed out that the husband had no power to enter into an agreement for sale in respect of the wife's property. The learned Judges pointed out (at page 186) :

1. 24 M L J. 180 : I L R (1915) 38 Mad. 134.
2. I L R. (1915) 38 Mad. 832 26 M.L J. 185.
3. (1938) 42 C W N 718.
4. A.I.R. 1950 Pat. 181.

"If the lady had intended that her attorney should have power to sell, mortgage and lease, nothing would have been simpler than to say so ; but this is not said."

The learned Judges further pointed out :

"If there had been a power to sell, then by necessary implication there would have been the power to settle the terms of sale. But there is no power to sell".

If that was the decision of the Patna High Court in relation to a power-of-attorney where expressly the power was conferred on the husband to execute deeds of sale, mortgage, lease, etc. on behalf of the grantor of the power the position is *a fortiori* here, where there is no enumeration of any power to execute all types of documents on her behalf, which necessarily has to be understood in the context of the specified and enumerated powers conferred on the first defendant by Janaki Ammal For these reasons, I am of the view that the power-of-attorney executed by Janaki Ammal in favour of the first defendant on 30th June, 1937 did not authorise the first defendant to execute Exhibit A-1 on behalf of Janaki Ammal and therefore the said document is not binding either on Janaki Ammal or the 2nd defendant.

With reference to the second point urged by the learned Counsel, Mr. Rajagopala Iyer referred to several decisions for contending that the Courts below are wrong in holding the view that the benefit of section 53-A of the Transfer of Property Act will be available only to a defendant and not to a plaintiff. In this context he drew my attention to the decision in *Ewaz Ali* v. *Firdaus Jehan Musammal*[1], and the decisions in *Achayya* v. *Venkata Subba Rao*[2], *Akram Mea* v. *Municipal Corporation, Secunderabad*[3]. In *Achayya* v. *Venkata Subba Rao*[2], it was observed :

"The section does not either expressly or by necessary implication indicate that the rights conferred on the transferee thereunder can only be invoked as a defendant and not as a plaintiff. Under the terms of the section the transferor is debarred from enforcing against the transferee only rights in respect of the property and this bar does not depend upon the array of the parties. The transferee can resist any attempt on the part of the transferor to enforce his rights in respect of the property whatever position he may occupy in the field of litigation. In one sense it is a statutory recognition of the defensive equity. It enables the transferee to use it as a shield against any attempt on the part of the transferor to enforce his rights against the property.

Whether the transferee occupies the position of a plaintiff or a defendant, he can resist the transferor's claim against the property Conversely, whether the transferor is the plaintiff or the defendant, he cannot enforce his rights in respect of the property against the transferee. The utility of the section or the rights conferred thereunder should not be made to depend on the manoeuvering for position in a Court of law; otherwise a powerful transferor can always defeat the salutary provisions of the section by dispossessing the transferee by force and compelling him to go to a Court as plaintiff".

However, it is needless for me to pursue this line of authority for the reason that in my view section 53-A of the Transfer of Property Act cannot be relied on by the plaintiff for the purpose of obtaining the relief which he has prayed for in the present suit. For one thing, for the application of section 53-A the following conditions must be cumulatively satisfied; (*i*) there must be a contract to transfer immovable property for consideration, (*ii*) the contract must have been signed by or on behalf of the transferer, (*iii*) the terms can be ascertained with reasonable certainty from the document; (*iv*) the transferee has to be in possession or, if he has been already in possession, continues in possession, (*iv*) he has done some act in furtherance of the contract; and (*vi*) the transferee has performed or is willing to perform his part of

1. I.L.R. (1944) Luck. 565.
2. (1956) 1 An.W.R. 830 : A.I.R. 1957 A.P. 854.
3. (1957) 1 An.W.R. 135 : A.I.R. 1957 A.P. 859.

the contract As far as the present case is concerned, the last condition has not been satisfied Admittedly the plaint in this case does not contain any averment that the plaintiff is willing and prepared to pay the balance of consideration of Rs. 3,500 Mr Rajagopala Iyer, the learned Counsel for the appellant contended that it was not necessary that such an averment should be contained in the plaint itself For this purpose he relied on a decision of this Court in *Karthikeya Mudaliar v. Singaram Pillai*[1], and drew my attention to the following passage occurring in the judgment (at page 517):

> " Section 53-A, however, does not provide that there must be a plea in a suit for possession, where the defendant seeks the aid of section 53-A, that he is ready and willing to perform his part of the contract "

However, the very next sentence is against the appellant in this case. That sentence is:

> " The readiness and willingness to perform his part of the contract must no doubt be established by evidence and that readiness and willingness must be shown to have existed ever since the time of the agreement and not necessarily when the suit is filed."

It is further observed :

> " It may be that such a pleading may be absolutely necessary in a suit for specific performance on the part of the plaintiff. But the absence of an averment in the written statement in a suit for possession where the defendant raises plea under section 53-A does not appear to me to be fatal as section 53-A does not in terms provide for any such requirement "

Admittedly, in this case, the plaintiff has not let in evidence to show that he was ready and willing to perform his part of the contract. Therefore, condition No (VI) enumerated already is not satisfied in this case and for this reason the plaintiff cannot have any reliance on section 53-A.

For another reason as well the appellant cannot rely on section 53-A of the Act. The Privy Council in *Probodh Kumar Das* v. *Dantmara Tea Company Ltd*[2], had observed as follows (at page 297) :

> " In their Lordships' opinion, the amendment of the law effected by the enactment of section 53-A concerned no right of action on a transferee in possession under an unregistered contract of sale Their Lordships agree with the view expressed by Mitter, J , in the High Court that ' the right conferred by section 53-A is a right available only to the defendant to protect his possession ' They note that this was also the view of their late distinguished colleague, Sir Dinshah Mulla, as stated in the second edition of his treatise on the Transfer of Property Act, at page 262 The section is so framed as to impose a statutory bar on the transferor; it confers no active title on the transferee Indeed, any other reading of it would make a serious inroad on the whole scheme of the Transfer of Property Act."

In the judgment of the Andhra Pradesh High Court already referred to, namely, *Yengu Achayya* v *Venkata Subba Rao*[3], the learned Judges observed.

> " It is settled law that under section 53-A of the Transfer of Property Act, no title passes to a transferee He cannot file a suit for a declaration of his title to the property or seek to recover possession of the same on the basis of any title conferred on him. But if the conditions laid down in the section are complied with, it enables the transferee to defend his possession if the transferor seeks to enforce his rights against the property. This statutory right he can avail himself both as a plaintiff and as a defendant provided he is using his right as a shield and

1. (1956) 2 M L J. 515.
2. L.R. (1939) 66 I A. 293 : (1940) 1 M L.J. 75.
3. (1956) An W R 830 : A I R. 1957 A.P. 854.

not as a sword. Or, to put it in other words, he cannot seek to enforce his title but he can resist the attack made by a transferor."

I may point out here that in view of the provisions contained in section 54 of the Transfer of Property Act, the position cannot be different, because under that section, where immovable property of the value of rupees hundred and upwards is sought to be sold, the sale has to be effected only by means of an instrument executed, attested and registered as required by law. The same section clearly and categorically provides that a contract for sale of immovable property by itself does not create any interest in or charge on such property. Therefore, to hold that a person who has been put in possession of a property pursuant to an agreement to sell, in whose favour no conveyance has been executed, can establish his title on the basis of that agreement to sell itself, is to fly in the face of the provisions contained in section 54 of the Act and is to render the same clearly nugatory. Hence, it is clear that the appellant cannot pray for a declaration of his title based upon section 53-A of the Transfer of Property Act. In this context it is important to note the following observations of the Supreme Court in *Ram Gopal Reddy* v. *Additional Custodian, Evacuee Property*[1] (at p. 1440):

" It may be that if Abdul Aziz Khan had tried to get back the property, section 53-A of the Transfer of Property Act would come to the aid of the appellant in defence. But the present suit has been filed to establish the right of the appellant as owner of the property and in such a suit the appellant cannot take the benefit of section 53-A of the Transfer of Property Act "

That leaves me with the third point, namely, the claim of the appellant that he had perfected his title to the property by adverse possession. In this context it is desirable to refer to the fact that the learned Subordinate Judge has come to the conclusion that subsequent to 24th June, 1947, it was the plaintiff and the fifth defendant who were in possession of the property and neither the first defendant nor the second defendant was in possession of the property On the other hand, the learned District Judge did not appear to agree with this conclusion. In this view the evidence adduced on behalf of the appellant did not establish a continuous possession, but established only sporadic acts which would not tantamount to being in adverse possession for over twelve years. For the purpose of the argument of the learned Counsel for the appellant, I am prepared to assume that the appellant and the fifth defendant had been continuously in possession of the property ever since 24th June, 1947. The question is whether such possession can be said to be adverse to Janaki Ammal and, therefore, to the second defendant. In my opinion such possession cannot be said to be adverse. The concept of adverse possession contemplates a hostile possession; *i e*, a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's rights, but denies them. In *Ejas Ali* v *Special Manager, Court of Wards*[2], the Judicial Committee observed (at page 56):

" The principle of law is firmly established that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed."

For deciding whether the alleged acts of a person constituted adverse possession, the animus of the person doing those acts is the most crucial factor. If that be the case, can it be said that the possession of the plaintiff and the fifth defendant which started with the agreement of sale dated 24th June, 1947, was adverse to Janaki Ammal. As I pointed out already, the document, namely, Exhibit A-1 itself contemplated the execution of a subsequent conveyance and the execution of the

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1. (1966) 2 M L J (S C.) 90 : (1966) 2 An. W.R. (S C) 90 (1966) 2 S C J. 782 · (1966) 3 S.C R. 214 : A.I R 1966 S C. 1438.

2. (1935) 68 M L J 397 : A I R. 1935 P.C. 53.

conveyance had to be postponed because with reference to the interest of Kuppammal the sanction of the District Court had to be obtained. Therefore, when the plaintiff and the fifth defendant were in possession of the suit property ever since 24th June, 1947, they were in derivative or permissive possession in anticipation and expectation of obtaining a deed of conveyance from the real owners The fundamental postulate of that possession is that they acknowledged and recognised the title of Janaki Ammal to the suit property and it is only on that basis that they expected and hoped to get a conveyance from her Mr. Rajagopala Iyer, the learned Counsel for the appellant, in this connection, relied on the decision of this Court in *Sheik Dawood Saheb* v *Moideen Batcha Saheb*[1]. In that case the defendant's father had obtained a usufructuary mortgage of the suit property and four or five years after the mortgage, the mortgagor told the mortgagee to take the suit property in lieu of the whole debt of Rs 75 and therefore he enclosed it by a wall The question that came up for consideration was whether the mortgagee had become the owner of the property In view of the fact that the consideration was only Rs 75, by virtue of the provisions contained in section 54 of the Transfer of Property Act, the mortgagee could have become the owner of the property by obtaining delivery of the property itself. The mortgagee was already in possession of the property and the delivery in such a case could not have been physical delivery, but only a symbolic or constructive delivery or the change in the character of possession and where such change in the character of possession was established, the mortgagee would have obtained title to the property under the provisions of section 54 of the Act itself In that context an argument was advanced that the mortgagee was in possession of the property only pursuant to an agreement of sale and therefore he could not claim title to the property by adverse possession and reliance for this purpose was placed on *Vizagapatam Sugar Co* v *Muthurama Reddi.*[2] Dealing with the argument, the learned Judge of this Court observed.

> " Apart from this anomaly, the facts of this case are different from *Vizagapatam Sugar Co.* v *Muthurama Reddi*[2], where the delivery was in part-performance of an agreement to sell Here there was an attempt at a sale and the change in the character of possession was in pursuance of such an attempt Even if there was no difference between the two cases we do not see any reason why the possession obtained in part performance of an agreement to sell or the possession in its changed character which was the result of an attempted but infructuous sale should not be adverse to the vendor."

It is on this passage that the learned Counsel for the appellant placed reliance In my opinion, this decision is not of assistance to the contention of the learned Counsel. In the first place, the learned Judges who constituted the Bench recognised the decision of the Full Bench in *Vizagapatam Sugar Co.* v. *Muthurama Reddi*[2], as laying down the proposition that where the delivery was in part performance of an agreement to sell there could not be adverse possession, and I am not entitled to assume that the learned Judges who constituted the Division Bench were ignoring or differing from the decision of the Full Bench. Secondly, the said observation was merely *obiter* The reason is that, if there had been delivery of possession to the mortgagee, there was no need for him to rely on adverse possession at all; for, since the consideration was only Rs 75, the very delivery conferred title on the mortgagee under the provisions of section 54 of the Transfer of Property Act. Therefore, I am not able to hold that this decision lays down the proposition that the possession of a person who enters into possession of a property pursuant to an agreement to sell, but in whose favour no conveyance has been executed , is adverse to the true owner On the other hand, a recent decision of a Bench of this Court clearly and categorically laid down that such possession cannot be adverse. After elaborately dealing with the question of adverse possession with reference to an invalid transaction of sale

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1 (1925) 48 M L J. 264. 2. (1923) I.L R. 46 Mad. 919 : 45 M L J. 528.

or infructuous document of sale, the Bench pointed out in *Annamalai* v. *Muthiah*[1] (at page 260):

"In the case of an executory contract of sale where the transferee is put in possession of the property in pursuance of the agreement of sale and where the parties contemplate the execution of a regular registered sale deed the position is different. The purchaser who gets possession in such cases is in possession in a derivative character and in clear recognition of and in acknowledgment of the title of the vendor. The animus of the purchaser throughout is that he is in possession of the property belonging to the vendor and that the former's title has to be perfected by a duly executed registered deed of sale under which the vendor has to pass on and convey his title.

....In the instant case the possession of the respondent was in pursuance of and under the agreement of sale, right from the inception, and, therefore, clearly permissive in character, besides being in recognition and acknowledgment of the title of the owner . ...We are of the clear opinion that in the conception of adverse possession there is an essential and basic difference between a case in which the other party is put in possession of property by an outright transfer, both parties stipulating for a total divestitute of all the rights of the transferor in the property, and a case in which there is a mere executory agreement of transfer, both parties contemplating a deed of transfer to be executed at later point of time In the later case the principle of estoppel which applies between mortgagor and mortgagee or a lessor and lessee clearly applies, estopping the transferee from contending that his possession, while the contract remained executory in stage, was in his own right and adversely against the transferor. Adverse possession implies that it commenced in wrong and is maintained against right. When the commencement and continuance of possession is legal and proper, referable to a contract, it cannot be adverse"

This decision of the Bench of this Court clearly applies to the facts of the present case. Therefore, I am of the definite opinion that the plea of adverse possession taken up by the appellant cannot prevail in this case The Courts below have also considered the question whether the decree in O S No. 53 of 1956 interrupted the adverse possession, if any, commenced by the appellant on 24th June, 1947. In view of my conclusion that the possession of the appellant and the fifth defendant was never adverse to Janaki Ammal and subsequently to the first defendant, it is not necessary for me to consider what the effect of the decree in O S. No. 53 of 1956 was with reference to the adverse possession, if any, on the part of the appellant and the fifth defendant.

No other point was urged before me Under these circumstances, the Second Appeal fails and is dismissed with the costs of the second defendant

No leave.

V.K. *Appeal dismissed.*

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1. I.L.R. (1965) 1 Mad. 254.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M M ISMAIL.

The State of Madras represented by the Secretary to Government, Home Department, Madras-9 . *Appellant**

v.

T. Raman and another . *Respondents*

Civil Procedure Code (*V of* 1908), *section* 9—*Order of Magistrate under section* 517, *Criminal Procedure Code, ordering confiscation of goods*—*Civil suit for recovery of the goods by person claiming to be the real owner*—*Maintainability*

Limitation Act (*IX of* 1908), *Articles* 2, 29 *and* 49—*Suit for recovery of moveable property* in specie *or for its value*—*Governed by Article* 49 *and not by Article* 2 *or* 29

An order of the Magistrate under section 517 of the Criminal Procedure Code, directing confiscation of goods does not decide any question of title to the goods as he is merely concerned with deciding the right to immediate possession of the goods. The order does not prevent a person claiming to be the real owner of the goods from agitating his title to the goods in a civil Court

Any person who claims to be the owner of the property will be entitled to file a suit for recovery of the same from anybodyelse who may be found to be in possession thereof without the authority of the law or sanction of the law Such a suit cannot be said to be a suit for compensation for wrongful act committed by any person.

When a suit is one for recovery of moveable property *in specie* or in the alternative for its value, neither Article 2 nor Article 29 of the Limitation Act, 1908, can have any application The only Article which will apply to such a suit is Article 49 under which the period of limitation is three years.

Appeal against the Decree of the City Civil Court, Madras, in Appeal Suit No. 63 of 1962, preferred against the decree of the City Civil Court of Madras in Original Suit No. 1945 of 1959

The Additional Government Pleader (*V. Ramaswami*), for Appellant.

V. N. Shama Rao and *Rangarajan* and *K. N Balasubramanian*, for Respondents.

The Court delivered the following

JUDGMENT —The 1st defendant in O S. No 1945 of 1959 on the file of the City Civil Court at Madras is the appellant before this Court That suit was instituted by the 2nd respondent (plaintiff) for recovery of 13,500 G K Brand flash light lamp bulbs and electric holders taken by the 2nd defendant on 30th September, 1967, from the plaintiff and ordered to be confiscated to the Government or, in the alternative, for recovery of their value of Rs. 1,364-25 together with interest.

The circumstances under which the suit came to be filed as alleged by the plaintiff himself was that on 30th September, 1967, the 2nd defendant, a Sub-Inspector of Police, raided the plaintiff's shop on the ground that he had information that some goods were stolen and they were sold to the plaintiff by one Mohamed Ibrahim, a broker; that the plaintiff represented to the Sub-Inspector that they were not stolen goods and that whatever he had purchased from the said Mohamed Ibrahim had been sold away by him except for 10 bulbs; the Sub-Inspector insisted on the plaintiff obtaining 13,500 G.K. Brand flash light lamp bulbs and small electric holders and therefore because of the threat, coercion and intimidation of the said Sub-Inspector, the plaintiff purchased from the bazaar 13,500 G.K Brand flash light lamp bulbs and handed them over to the Sub-Inspector along with 9 boxes of small electric holders. The plaintiff's further case was that one Poonukkannu Babu was prose-

*S.A. No. 776 of 1964. 25th April, 1968.

cuted under section 65 of the City Police Act and in those proceedings the Magistrate ordered confiscation of these bulbs and electric holders without any notice to him and as soon as the plaintiff came to know of the order of the Magistrate, he applied to the Magistrate under section 517 of the Criminal Procedure Code for delivery of those articles to him, but the learned Magistrate declined to order such delivery on the ground that he had no power to review his order and that order of the Magistrate was upheld by the High Court also It was under such circumstances, the plaintiff came forward with the contention that the entire act of the Sub-Inspector was illegal and contrary to law and the order of confiscation also was made without the correct facts being placed before the Magistrate, and therefore he was entitled to delivery of the goods or their value The claim of the plaintiff was resisted by both the 1st and 2nd defendants. However, the learned Second Assistant Judge, City Civil Court, Madras, overruled the objections of the defendants and found as a fact that the articles recovered by the 2nd defendant from the shop of the plaintiff on 30th September, 1967, were not stolen goods and that the major portion of the above articles were purchased by the plaintiff from the bazaar and the plaintiff had to surrender all the articles before the 2nd defendant under threat, coercion and intimidation on the part of the 2nd defendant. The learned Judge also came to the conclusion that the 2nd defendant violated the relevant provisions of law in conducting the search of the plaintiff's shop and the above search was illegal and the second defendant had abused his authority as a Police Officer. The further conclusion recorded by the learned Judge was that the confiscation of the goods ordered by the Magistrate was wrong and it could not be supported. The plea that the suit itself was barred by limitation was raised by the defendants, but the learned Judge overruled the plea and held that the suit was not barred by limitation. Consequently, by his judgment and decree dated 23rd December, 1961, the learned Second Assistant Judge decreed the suit of the plaintiff. Against this judgment and decree, the defendants, preferred A.S No. 63 of 1962 and the same was disposed of by the learned Principal Judge, City Civil Court, Madras The learned Principal Judge agreed with the conclusion of the Court below and dismissed the appeal. I may point out here that the learned Principal Judge proceeded on the basis that the suit itself was not for compensation or damages against the State for the wrongful acts of its officers, but only for recovery of specific goods taken away from him The learned Principal Judge further recorded that even if it was to be held that the suit was for compensation for wrongful act committed by the 2nd defendant, still the 1st defendant would be liable to the claim of the plaintiff. In relation to the question regarding limitation, the learned Principal Judge pointed out that the three years period will be available to the plaintiff to file the suit and therefore it was not barred by limitation. It is against these judgments and decrees, the State of Madras has filed the present Second Appeal.

Mr. V Ramaswami, learned Additional Government Pleader, realising the scope of the Second Appeal under section 100 of the Code of Civil Procedure, did not very property convass the correctness of the findings of the Courts below that the goods were purchased by the plaintiff from the shop and delivered or surrendered under threat of coercion, intimidation, etc Therefore he confined his arguments to two questions of law, namely, (1) that for the tortious act of the 2nd defendant, who was exercising his statutory functions as a Police Officer, the State of Madras could not be held liable and (2) that the suit was barred by limitation, since the proper article of the Limitation Act that would be applicable to the facts will be either Article 2 or Article 29.

In my opinion the first argument is really misconceived. As a matter of fact, for this misconception, the Courts below have also contributed to a great extent The suit is really not for compensation for any tortious act committed by the 2nd defendant and, though the learned Principal Judge had referred to this fact in one part of the judgment, he did not pursue or sustain that line through the whole of the udgment. As I pointed out already, the suit itself was for recovery of 13,500 pieces of torchlight bulbs and 9 boxes of small electric holders taken by the 2nd defendant on

30th September, 1967, from the plaintiff. If that be the case, the basis of the suit is not commission of any tortious act and the claim is not for damages with reference to such tortious act. On the other hand, any person who claims to be the owner of the property will be entitled to file a suit for recovery of the same from any body else who may be found to be in possession thereof without the authority of the law or sanction of the law. Such a suit cannot be said to be a suit for compensation for wrongful act committed by any person. Consequently, the only question that remains for consideration is whether the plaintiff is entitled to file the suit for recovery of the goods, which have been already ordered by the Magistrtate to be confiscated to the Government. The fact that the goods were directed to be confiscated by the Magistrate and they have been taken possession of by the Government and they were subsequently disposed of and the Government are in possession of the sale proceeds is not disputed The only argument advanced by the learned Additional Government Pleader is that the order of confiscation passed by the learned Magistrate has not been set aside, nor has the plaintiff prayed for setting aside of that order and that, under such circumstances, it is not open to the plaintiff to file a suit directly for recovery of the said articles. In my opinion, this argument overlooks the fact that the order of the Magistrate directing confiscation of the goods does not decide any question of title to the goods As far as the particular case is concerned, though the plaintiff was cited as a prosecution witness for the prosecution of Poonukkannu Babu, still ultimately Poonukkannu Babu pleaded guilty and therefore the plaintiff was not examined in the Court If the plaintiff had been examined, he would have had occasion to put forward his case that the goods belonged to him by purchase and they were not stolen property Under such circumstances the order of confiscation passed by the Magistrate was passed without notice to the plaintiff and in his absence. So it cannot be said that the said order is binding on the plaintiff and it is not open to the plaintiff to canvass the correctness of the order in a Civil Court where he seeks to recover possession of the articles. Over and above that, it has been held by the High Court of Andhra Pradesh in *C Subba Rao* v. *State of Andhra*[1] that the order of confiscation does not prevent a person claiming to be the real owner of the goods from agitating his title to the goods in a Civil Court The learned Judge there pointed out that, under section 9 of the Code of Civil Procedure, Courts have jurisdiction to try all suits of civil nature excepting suits the cognizence of which is either expressly or impliedly barred and the general rule of law is that when a legal right and an infringement thereof is disclosed and a cause of action is disclosed, and unless there is bar to the entertainment of a suit, the ordinary Civil Courts are bound to entertain the claim As far as the order of consfication is concerned, no principle or provision of law has been brought to my notice so as to contend that the mere presence or existence of the order of confiscation will bar a suit of this nature instituted by the plaintiff. Further, in *Jaganath Hazarimal Firm* v. *State of Bombay*[2], a Bench of the Bombay High Court has taken the view that an order under section 517 of the Criminal Procedure Code only concludes immediate right to possessions, but does not conclude the right or title of any person to the ownership of the property and the real owner may proceed against the holder of the articles and it cannot be said that there is any necessity of having that order set aside. In view of these decisions and on the general principle that a Magistrate, while he passes an order under section 517 of the Criminal Procedure Code, does not decide the question of title and he is merely concerned with deciding the right to immediate possession of the goods, I hold that the present suit of the plaintiff to recover possession of the articles is not barred by any principle of law and consequently the suit as such was maintainable.

Regarding the contention about the proper Article of the Limitation Act applicable to the suit of the 2nd respondent, I may mention that the contention of the learned Additional Government Pleader that either Article 2 or Article 29 of the Limitation Act of 1908 alone applies to the present suit again proceeds on a misconception that the suit is for recovery of damages or compensation for tortious act

1. A.I.R. 1958 Andh. Pra. 403.
2. A.I.R. 1963 Bom. 83.

committed by the 2nd defendant As I pointed out already, the suit itself is one for recovery of movable property *in specie* or in the alternative for its value and consequenlty neither Article 2 nor Article 29 can have any application to the suit The only other Article which will have application to a suit of this nature where the relief prayed for is recovery of specific movable property is Article 49, under which the period of limitation is three years If the correct Article to be applied is Article 49, admittedly the suit is within time and not barred by limitation.

Under these circumstances, both the contentions put forward on behalf of the State fail and the Second Appeal is dismissed with the costs of the 2nd respondent (plaintiff). No leave.

V.K. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE N. KRISHNASWAMY REDDY.

K.M. Wahi and others .. *Petitioners**

v.

Madras Aluminium Company Ltd., Coimbatore .. *Respondent.*

Criminal Procedure Code (V of 1898), *section* 561-*A—Inherent jurisdiction under—When can be invoked.*

Criminal Trial—Civil Proceedings—If bars institution of criminal proceedings.

Criminal Procedure Code (V of 1898), *section* 236—*Two charges one under section* 420, *Indian Penal Code, and another under section* 409, *Indian Penal Code—If can co-exist.*

The inherent jurisdiction of the High Court can be exercised in quashing proceedings in three categories of cases, namely, (1) where it manifestly appears that there is a legal bar against the institution of the criminal proceeding in respect of the offence alleged, (2) where the allegations in the First Information Report or the complaint do not constitute the offence alleged ; and (3) even where the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge (*Vide R.P. Kapur* v. *State of Punjab*, A.I.R. 1960 S C 866).

There is no legal bar for a person to take action against another by instituting civil or criminal proceedings either simultaneously or one after the other.

The contention that charges under sections 420 and 409 of the Penal Code cannot co-exist as the ingredients of both the offences are so distinct and different and that therefore a person cannot be charged with both the offences on the same facts, in untenable. It is true that a person cannot be convicted ultimately under both the charges He can be convicted only of any one of the charges, but there cannot be a bar for framing chargs though they may appear to be inconsistent. After the trial it is for the Magistrate to consider, which one of the offences, section 420 or section 409 of the Penal Code, is made out

Petition praying that in the circumstances stated therein the High Court will be pleased to quash the charges framed against them in C C No. 487 of 1967 on the file of the Court of the Additional First Class Magistrate, Coimbatore

V. T. Rangaswami Ayyangar and *B. Sriramulu,* for Petitioners.

S. Mohan Kumaramangalam for *Subbaraya Ayyar, Sethuraman, Padmanabahan and N. Krishnamoorthy,* for Respondent.

The Assistant Public Prosecutor, for State.

The Court made the following

ORDER —This petition has been filed under section 561-A, Criminal Procedure Code, to quash the charges framed against the petitioners in C C.No 487 of 1967 on the file of the Additional First Class Magistrate, Coimbatore.

*Crl.M.P. No. 2961 of 1967. 31st July, 1968.

There are no merits in this petition and the same has to be dismissed On this view, it will not be necessary to set out in detail either the facts of the case or the discussion in respect of them

Sri V T. Rangaswami Iyengar, the learned Counsel for the petitioners has requested that in case the petition has to be dismissed, the matter need not be discussed in detail lest any observation made in the order might cause embarrassment to the parties concerned in the course of the trial. The petitioners have invoked the inherent jurisdiction of this Court to quash the proceedings pending before the lower Court.

The Supreme Court has clearly stated in *R P Kapur* v. *State of P njab*[1], that the inherent jurisdiction of the High Court can be exercised in quashing proceedings in three categories of cases, namely, (1) where it manifestly appears that there is a legal bar against the institution of the criminal proceeding in respect of the offence alleged; (2) where the allegations in the First Information Report or the complaint do not constitute the offence alleged , and (3) even where the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge. Applying this principle, it cannot be said that the charges framed by the Magistrate in the present case falls under any one of the categories.

The petitioners are accused 1, 2, 3, 4 and 6 in C C No 487 of 1967 on the file of the Additional First Class Magistrate, Coimbatore The Madras Aluminium Company Ltd , Coimbatore, filed a complaint against these petitioners and two others alleging that they had conspired to cheat the complainant to the tune of Rs 3¼ lakhs and odd on false representation that they would secure an Excavator and its accessories from a foreign country by placing an order with a concern there and clearing the consignment at the Madras Harbour, which they failed to do Petitioners 1 and 2 are two of the directors The third petitioner is the General Sales Manager. The fourth petitioner is the Accountant The fifth petitioner is the Secretary.

The complainant examined P W. 1, the Chief Accountant of the company and three other witnesses who are the representatives of the various banks and who gave evidence in respect of certain documents The learned Additional First Class Magistrate after hearing the evidence of the prosecution witnesses adduced on behalf of the prosecution, framed three charges against all the petitioners, namely, (1) under section 120-B read with section 420, Indian Penal Code, (2) under section 420, Indian Penal Code, and (3) under section 409, Indian Penal Code.

The evidence of the prosecution witnesses and other documents filed, before the charges were framed, disclosed briefly these facts : The complainant is a public limited company with a capital of R 6 crores with its factory at Mettur and registered office at Coimbatore and an office at Madras It required for its expansion Skoda Excavator and accessories from Czechoslovakia in Europe The complainant company obtained licence under Import Trade Control from the Government of India for importing the said machinery after having had negotiations with the United Provinces Commercial Corporation (P) Ltd., Calcutta, with which the petitioners are concerned in one capacity or the other The complainant company also obtained a letter of authority on 29th April, 1966, permitting the petitioners' company to import the said machinery, to open a letter of credit and make remittances of foreign exchange on behalf of the complainant. The letter of authority and other documents were delivered to the petitioners' company on 23rd July, 1966.

In August, 1966 the Corporation stated that consequent on devaluation of the rupee the price to be paid has risen The complainant agreed to it and assured to pay the price of Rs 3,42,462 In October, 1966, the petitioners' company reported that the machinery had arrived and required the complainant to pay to enable the

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1. A.I.R. 1960 S.C. 866.

documents to be got with a view to clear the said goods The complainant received a communication from accused-4 K L Srivatsava, the Accountant of the petitioners' company asking the complainant to pay the bill immediately stating that the documents have been negotiated through their banks. Believing the representation to be true, the complainant paid the amount of Rs 3,26,168-47 P. to the State Bank of India, Coimbatore expecting release of goods and documents of title After payment, it was discovered that the Bill of Lading on which the amount was paid was a mere copy and in the absence of the original, delivery could not be had It is thus the case of the complainant that the petitioners had deceived the complainant and misappropriated the money sent by the complainant Further enquiry revealed that a letter of credit has been opened with the Bank of Tokya, Ltd., Calcutta, and that the original Bill of Lading and connected documents are with the said Bank and the petitioners had to pay the said Bank and get the original Bill of Lading and other documents. These facts would reveal that though the petitioners had admittedly received Rs. 3 lakhs and odd from the complainant, they had not made arrangements to clear the goods from the harbour and it also appears to be clear that the amount received by them was not paid to the Bank of Tokyo Ltd , Calcutta, with whom the letter of credit has been opened in respect of the machinery, Skoda Excavator and its accessories

It is contended by the learned Counsel that the complainant has already taken civil action and that, therefore, the criminal proceedings would not lie as the matter is of a civil nature I cannot agree with this broad proposition. There is no legal bar for a person to take action against another by instituting civil or criminal proceedings either simultaneously or one after the other. It is next contended by the learned Counsel that the two charges, namely, under section 420, Indian Penal Code and section 409, Indian Penal Code, cannot co-exist as the ingredients of both the offences are so distinct and different that a person cannot be charged with both the offences on the same facts. There is no substance in this contention It is true that a person cannot be convicted ultimately under both the charges. He can be convicted only of any one of the charges; but there cannot be a bar for framing charges though they may appear to be inconsistent. Section 236, Criminal Procedure Code, is as follows :—

"If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once ; or he may be charged in the alternative with having committed some one of the said offences".

After the trial, it is for the Magistrate to consider, which one of the offences, section 420, Indian Penal Code or section 409, Indian Penal Code, is made out. I do not find any infirmity in the charges framed by the Additional First Class Magistrate, Coimbatore. The trial, therefore, will proceed on the three charges framed by the lower Court.

The petition is dismissed.

V.K. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. M ANANTANARAYANAN, *Chief Justice* AND MR. JUSTICE M. NATESAN.

The State of Madras represented by the Revenue Divisional Officer, Madurai ... *Appellant**

v

Mani Bharathi *alias* K. Balasubramanian ... *Respondent*

Land Acquisition Act (I of 1894), sections 18 and 23—Scope—Proceedings before the Court on a reference—Not a continuance of proceedings before the Collector—Decision of the Court to rest on evidence—Collector's award only a prima facie *evidence*

Land Acquisition Act (I of 1894), section 23—Determination of market value of the land acquired—Judicial process—Reliance on sales of neighbouring lands—Sales to be of comparable quality and situation.

The proceedings before the Court on a reference under section 18 of the Land Acquisition Act are not a mere continuation of the proceedings before the Collector. The enquiry before the Court on the reference are wholly judicial and the decision of the Court has to rest on evidence duly placed before the Court or on admissions that could be properly relied upon. The facts that have been the subject of consideration by the Collector for fixing the market value of the land do not automatically become evidence before the Court unless parties consent to such procedure. A Collector's award when it is not accepted by the claimant and when a reference is sought, it is only an offer by the Collector. Of course on a reference under section 18, the award of the Collector will be *prima facie* evidence and the claimant will have to displace it The burden of proof will be on the claimant to show that the compensation determined upon by the Collector is inadequate as his opposition is like that of a plaintiff

In the present case both before the Collector and on the reference the method adopted for determining the market value has been to seek guidance from the sales of neighbouring lands. In the absence of recent sales in the vicinity, the question whether the sale deeds relied upon could afford any guide is a question to be determined having regard to all the surrounding circumstances making due allowances for matters that could detract from the value of the evidence furnished by the sales, ascertainment of the market value of the land under section 23 is a judicial process and the Court may properly take into consideration all such factors as would influence a willing purchaser in making his maximum offer or a willing vendor in quoting his lowest price.

Even giving due allowance for such features as may detract from the value of the land it is difficult to say how the compensation could be fixed at Rs. 80 per cent. In the absence of evidence of fall in prices and even excluding the rise in prices since 1949 sworn to by the claimant The sales as evidenced from the sale deeds relied upon by the claimant, it is clear that these sales are of land of fairly comparable quality and situation On that basis making, due allowance that an extent of one acre and 90 cents is now acquired and that it is somewhat removed from the main road abutting another road, the fair and reasonable compensation for the acquired land could be fixed at Rs. 110 per cent

Appeals against the decree of the Subordinate Judge, Madurai in Original Petition No. 147 of 1959

Additional Government Pleader (*V Ramaswami*), *G. Ramanujam* and *T. N. C. Rangarajan*, for Appellant.

K. Rajah Ayyar and *V. Seshadri*, for Respondent.

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* Appeal Nos. 604 of 1961 and 74 of 1962. 4th November, 1966.

The Judgment of the Court was delivered by

Natesan, J—These appeals arise out of the order passed by the learned Subordinate Judge of Madurai on a reference under section 18 (2) of the Land Acquisition Act. The acquisition is of an extent of one acre and 90 cents of dry land in S.No. 140 Kodikulam village of Madurai Taluk for constructing quarters for the police staff at Othakadai. The Land Acquisition Officer fixed the market value of the land at Rs. 30 per cent. and the learned Subordinate Judge has enhanced it to Rs 80 per cent. While the State has preferred Appeal Suit No. 604 of 1961 against the award of additional compensation, the claimant has preferred Appeal Suit No. 74 of 1962 claiming compensation in the appeal at Rs. 150 per cent.

The land under acquisition is situated at the junction point of Kodikulam, Narasingam and Arumbanur Village limits and adjacent to Anamalai Hills abuts on the road from Othakadai to Narasingam and other villages The notification under section 4 (1) of the Land Acquisition Act was published in the Gazette on 15th April, 1959. For the claimant reliance was principally placed upon the sale deeds Exhibits B-3 to B-9, dated 24th February, 1947 in respect of the portions of R.S. No. 147 adjoining R. S. No. 140, but separated by a channel. R S. No 147 was nanja land and under the sale deeds small extents of seven cents each were sold for house sites and the price ranges from Rs. 142 to Rs. 214 per cent Reliance was placed also on two sale deeds Exhibits B-10 and B-11 bearing date 16th February, 1947 of sales of land in R S. No. 144 of the extent of 20 cents under each deed at Rs. 150 per cent R S. No. 144 is further removed from R S No. 147 and nearer the Madurai Melur Main Road. Two other sale deeds, and these are of very small extents, relied upon by the claimant are of the year 1948 On behalf of the State two sale deeds Exhibits A-2 and A-3 have been placed on the record as evidence. Under Exhibit A-2 an extent of 18 cents is conveyed in R S. No. 203 in June, 1956. The rate works out to Rs 19 per cent. Exhibit A-3, is a sale in September, 1958 of an extent of 16½ cents in R S. No. 207 for Rs. 400 R S No 203 is far removed from the locality with which we are concerned and beyond the Anamalai Hills and even so R S No. 207. These sale deeds can in no sense be considered as comparable sales or of lands similarly situated, and there can be no doubt that guidance if any has to be sought only from the sales evidenced by Exhibits B-3 to B-9 subject to due allowance, but these sale deeds are not recent and this aspect is stressed strenuously for the State. The learned Subordinate Judge took into consideration the value of the land in the neighbourhood furnished by Exhibits B-2 to B-15 even in 1947 and rejected the values furnished by Exhibits A-2 and A-3. He took note of the fact that S No 147-2 the southen portion of which was the subject of the sales evidenced by Exhibits B-3 to B-9 was about two feet lower in level than the road, while the acquired site was about two feet higher in level than the road. He arrived at Rs 80 per cent as proper compensation. S. No. 147 has been the subject of land acquisition and the award in the case given by the learned Subordinate Judge of Madurai in Original Petition No. 34 of 1949 has been exhibited as Exhibit B-2. Under that award for the southern portion of S. No. 147-2, which is covered by the sale deeds Exhibits B-3 to B-9, the compensation was awarded on the basis of the price paid by the vendees. For the northern portion the trial Court awarded compensation at Rs. 100 and it is brought out in evidence that this Court on appeal therefrom by the State reduced the value of the northern portion to Rs. 50 per cent. For the State without filing the judgment of this Court it was contended that the reduction in the compensation amount was in respect of the whole of the property. The trial Court felt constrained in the absence of the judgment of this Court to hold that it could not safely rely on the award Exhibit B-2. Now before us learned Government Pleader for the State and the Counsel for the appellant have both referred to the judgment of this Court in Appeal Suit No. 366 of 1952 where the award came up for consideration and it has not been disputed before us that this Court on appeal reduced the compensation awarded by the learned Subordinate Judge only in respect of the northern portion of S. No. 147-2. It is not now disputed that there was no appeal even by the State in regard to the southern portion of S No. 147-2 which related to lands abutting the road leading from Othakadai to Narasingapuram and which were the subject of the

sale deeds Exhibits B-3 to B-9. We may here point out that in the trial Court, the claimant had specifically stated that there was no appeal by the State in respect of the southern portion of S. No. 147-2 measuring 52 cents.

The learned Government Pleader referred us to the decision of the Supreme Court in *S. L. A. Officer* v. *T.A. Setty*[1], where the Supreme Court has affirmed the principle that the function of the Court in awarding the compensation under the Act is to ascertain the market value of the land at the date of the notification under section 4 (1) and the methods of valuation may be (*i*) opinion of expert or experts; (*ii*) the price paid within a reasonable time in *bona fide* transactions of purchase of the lands acquired or the lands adjacent to the lands acquired and possessing similar advantages; and (*iii*) a number of years purchase of the actual or immediately prospective profits of the lands acquired. Learned Government Pleader contends that the sale deeds of 1947 are wholly irrelevant and ought not to be taken into consideration. But he sought to rely on two sale deeds one of the year 1952 and another of the year 1953 where portions in S. No 139 had been sold, the market rate working to Rs. 8 per cent in one and Rs 3 per cent in another case. This S No. 139 does not abut the road, S. No. 140 which comprises the acquired site intervening between S. No. 139 does not abut the road, S. No. 140 which comprises the acquired site intervening between S. No 139 and the road. The sale deeds themselves have not been brought into the record as evidence in the case and we are unable to appreciate how any reliance can be placed upon those transactions. The Land Acquisition Officer himself has not relied upon the sale deeds. He has awarded compensation at Rs. 30 per cent. If the sale deeds have any bearing on the matter under enquiry, the State ought to have exhibited these sale deeds so that the claimant may meet any inference that may be deduced from them. The proceedings before the Court on a reference under section 18 of the Land Acquisition Act are not a mere continuation of the proceeding before the Collector. The enquiry before the Court on the reference are wholly judicial and the decision of the Court has to rest on evidence duly placed before the Court or on admissions that could be properly relied upon. The facts that have been the subject of consideration by the Collector for fixing the market value of the land do not automatically become evidence before the Court unless parties consent to such procedure. The Collector's award when it is not accepted by the claimant and when a reference is sought, is only an offer by the Collector. Of course on a reference under section 18, the award of the Collector will be *prima facie* evidence and the claimant will have to displace it. The burden of proof will be on the claimant to show that the compensation determined upon by the Collector is inadequate as his position is like that of a plaintiff, the Government being the opposite party.

In the present case both before the Collector and on the reference the method adopted for determining the market value has been to seek guidance from sales of neighbouring lands. The learned Government Pleader's argument that the sales relied upon by the claimant are not recent overlooks that there is no evidence of recent sales of comparable land in the vicinity. The question of market value is not a question of law but a question of fact to be determined according to the circumstances of the particular case. The best evidence no doubt would be of sales of similar land with similar advantages at about the time of the notification under section 4 (1). In the absence of recent sales in the vicinity, the question whether the sale deeds relied upon could afford any guide is a question to be determined having regard to all the surrounding circumstances making due allowance for matters that could detract from the value of the evidence furnished by the sales. One thing that has to be borne in mind is that they should not be so remote as to make reliance upon them speculative. In certain localities there may be no sales at all for years and the land may be fallow giving no guidance for fixation of the market value by reference to the income therefrom. Whether sales are recent or not the degree of remoteness in regard to time is relative. Events may considerably change values in a short time, prices may spiral up or there may be steep falls. In such circumstances

1. (1959) S.C.J. 431 : (1959) 1 S.C.R. (Supp.) 404 : A.I.R. 1959 S.C. 429.

little reliance could be placed on sales separated even by a few months. The ascertainment of market value of the land under section 23 of the Land Acquisition Act like any other matter is a matter for legitimate deduction from the evidence placed before the Court. We may in this connection refer to the observations of the Judicial Committee in *Raja Vyricherla Narayana Gajapathiraju* v. *Revenue Divisional Officer, Vizagapatnam*,[1] wherein Lord Romer has observed at page 543 :

> " There is not in general any market for land in the sense in which one speaks of a market for shares or a market for sugar or any like commodity The value of any such article at any particular time can readily be ascertained by the prices being obtained for similar articles in the market. In the case of land, its value in general can also be measured by a consideration of the prices that have been obtained in the past for land of similar quality and in similar positions, and this is what must be meant in general by " the market value " in section 23. But sometimes it happens that the land to be valued possesses some unusual and it may be, unique features, as regards its position or its potentialities. In such a case the arbitrator in determining its value will have no market value to guide him, and he will have to ascertain, as best he may from the materials before him, what a willing vender might reasonably expect to obtain from a willing purchaser for the land in that particular position and with those particular potentialities."

The determination of the market value is thus a judicial process and the Court may properly take into consideration all such factors as would influence a willing purchaser in making his maximum offer or a willing vendor in quoting his lowest price. Of course these materials which the Court has to consider have to be brought on record by relevant and legal evidence and they must be tangible materials capable of objective assessment, not fancied consideration

In the present case while for the claimant it has been stated that the prices of house sites have been going up on behalf of the State it has not been contended, as it could not be that there has been depreciation in price of land since 1947. It is not only a matter of common knowledge and notoriety that there is an all round increase in the price of land, but there is evidence of the claimant in this regard. The only comment that was made for the State as regards this evidence is, securing an admission from the claimant that he had no document to show the increase in price. But it is not disputed that Othakadai in which there was originally one shop and one a *chathiram* had in recent years grown up and was having a population of 2,000 people. The claimant has stated that the locality is a market for neighbouring villages. While arriving at the figure of Rs. 80 per cent as the market value, the learned Subordinate Judge remarks that there was no independent evidence to prove that S. No. 147-2 was lower in level than the road and that the cost of levelling itself would be Rs. 100 to Rs 150 per cent while the acquired site was about two feet higher in level than the road. What the learned Subordinate Judge has failed to see is that there has been no attempt on the part of the State to disprove those claims of the claimant. At any rate, nothing has been said for the State to value the acquired land at less than the value given for the southern portion of S. No. 147-2 in 1947. It is submitted for the State that in the earlier award evidenced by Original Petition No 34 of 1949 all that was done was to compensate the purchasers of portions of S. No. 147-2 with the prices they paid. But certainly the award has accepted the price paid by the purchasers as the proper compensation for the land. The award thus determined the market value of the lands sold as the price paid for them by the vendees. There is absolutely no evidence before us that these are fictitious sales. There cannot be, as the State has accepted the prices. In the absence of any evidence of fall in prices, one may presume at the least that the prices have been stationary in spite of the village growing in population and in importance. It is stated for the claimant that there is a Higher Elementary School next to the acquired site and there is a police station in Othakadai. A co-operative bank and stores have also come up in Othakadai. As regards the northern portion of S. No 147-2 in respect

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1. L.R. 66 I.A. 104 : (1939) 2 M.L.J. 45 I.L.R. (1939) Mad. 532.

of which even according to the claimant the compensation was reduced to Rs. 50 per cent it must be noted that S No 147-2 was nanja land and the northern portion was land locked. We have another favourable factor in this that between 1947 and 1959 houses have been built in S No. 147.

No doubt allowance has to be made for the fact that the sales evidenced by Exhibits B-3 to B-9 are in respect of small extents of land about seven cents in extent each. The present acquisition is of a total extent of one acre and 90 cents. Also the acquired site though on the road from Othakadai to Narasingam is further removed from the Madurai Melur Main Road But it is dry land and not like S No. 147-2, nanja land Even giving due allowance for such features as may detract from the value of the land, we cannot see how the compensation could be fixed at just Rs 80 per cent In our view, while the market value of land cannot be fixed with mathematical accuracy and a certain amount of conjecture is inevitable, we are unable to see any basis for fixing it at Rs 80 per cent True, there cannot be exact reasoning for arriving at a particular figure ; irrefragable logic cannot be found in the reasoning But the guidelines followed should be properly indicated Here we have a feeling that the learned Subordinate Judge, has, for the reason that for the State it was contended that this Court had reduced the compensation even in respect of the southern part of S No 147-2, not really taken into consideration Exhibits B-3 to B-9. As pointed out above, in the absence of evidence of fall in prices and even excluding the steady rise in prices since 1949 sworn to by the claimant, these sales are of land of fairly comparable quality and situation. On that basis, making due allowance that an extent of one acre and 90 cents is now acquired and that it is somewhat removed from the main road abutting another road, we think that for the acquired land fair and reasonable compensation could be fixed at Rs. 110 per cent. Roughly we are deducting about Rs. 25 per cent on the price evidenced by the sale deeds Exhibits B-3 to B-9 having regard to the location of the property and the extent acquired and other features likely to affect the value.

In the result, Appeal Suit No. 74 of 1962 preferred by the claimant is allowed and the claimant is awarded compensation at Rs 110 per cent of land acquired with the usual solatium and the statutory interest, that is, this Court is awarding an additional compensation of Rs. 30 per cent over and above what has been given by the learned Subordinate Judge. Appeal Suit No. 604 of 1961 preferred by the State is dismissed. The claimant will be entitled to proportionate costs in his appeal—Appeal Suit No. 74 of 1962. There will be no costs in Appeal Suit No. 604 of 1961.

V.M.K. ——— *Oders accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE K SRINIVASAN AND MR. JUSTICE R. SADASIVAM.

The State of Madras represented by the Collector of Chingleput District, having its office at Saidapet, Madras-15 .. *Appellant**

v.

W.V.A. Govindaraja Chettiar .. *Respondent.*

Madras Requisitioning and Acquisition of Immovable Property Act (*XLII of* 1956)—*Pumping installation—Whether immovable property—Whether can be acquired under the Act.*

Constitution of India (1950), *Article* 299 *and Contract Act* (*IX of* 1872), *section* 70—*Agreement to purchase machinery, by State, through its officers—Contract not in writing—Validity of—State 'taking machinery' and using it for a considerable period—Whether State bound by contract*

Words and Phrases—"*Pumping installation*"—"*Whether immovable property.*"

Held, the Collector was not correct in his view that the pumping installation could not have been acquired under the Madras Requisitioning and Acquisition

* Appeal No 377 of 1962. 5th December, 1967.

of Immovable Property Act (XLII of 1956), as it was not immovable property. Immovable property, both under the Transfer of Property Act and the General Clauses Act, would include anything imbedded in the earth or attached to what is so imbedded. The fact it is capable of being removed does not render it any the less immovable property when it is fastened to earth in the manner in which high-power motors and a pumping installation as a whole are imbedded It may however be that the competent authority acting under the provisions of the Requisitioning and Acquisition of Immovable Property Act, proceeded to acquire only the land, buildings, trees, wells, etc , for both the agreement with regard to the compensation and the award passed by the enquiring officer only covered these items. That does not mean that there could not have been separate agreement with regard to the purchase of the pumping installation

It is not denied that the Director of Agriculture is a person who could enter into a valid contract on behalf of the State. The entire process of acquisition was started by the Department of Agriculture and must obviously be by the Head of the Department, the Director of Agriculture In entering into a transaction with private parties, the Department acts through its various subordinate links and it is not always that the Head of the Department enters into direct negotiations with the parties. If the entire activity of the Department as disclosed by the correspondence means anything at all, it means that the departmental officials acting under proper directions issuing from the Head of the Department proceeded with the negotiations in the present case and it must be assumed that when they told the plaintiff that the property would be acquired as a whole, they did so under proper authority. There is no doubt that the proceedings for the acquisition of the property including the pumping installation had been authorised by the Director of Agriculture. Though the contract was not in writing and might not come within the scope of Article 299 of the Constitution, for that reason the claim of the plaintiff cannot be defeated. Even if there is any invalidity attaching to the contract regarding the purchase, the fact that the Department took the property covered by such invalid contract and used it for a considerable length of time justifies the plaintiff's claim.

Appeal against the Decree of the Court of the Subordinate Judge, Chingleput, in Original Suit No. 61 of 1960, dated 6th February, 1962.

The Government Pleader and *T N. C. Rangarajan*, for Appellant.

C. R. Krishna Rao and *A. Kamala Devi*, for Respondent

The Judgment of the Court was delivered by

Srinivasan, J—The point that arises in this appeal is a very simple one. It is whether the State of Madras, acting through its officers, agreed to purchase certain pieces of machinery from the respondent and whether any such agreement operates as a binding contract. The contention of the State of Madras, which is the appellant, before the Court below was that whatever might have been the position during the earlier stages of the negotiation, there was no concluded contract for the purchase and that the claim made by the respondent plaintiff to recover any sum as the value of the machinery is not maintainable. The following facts are necessary to clarify the stand taken by either party.

The respondent was the owner of an extent of over 17 acres of land which he was running as a farm He had fitted up an oil engine, electric motors, pump lines and masonry channels to carry on water as part of the equipment of the farm It is not in dispute that originally the property was taken on lease by the Government for a period of six months on 21st August, 1957, the lease to be effective from 1st October, 1957 to 31st March, 1958 Even during the currency of the lease, proceedings were started under the Madras Requisitioning and Acquisition of Immovable Property Act, (Madras Act XLII of 1956), and a notice under section 3 (1) of the Act was issued on 5th January, 1958 by the Collector of Chingleput District This notice stated that as in the opinion of the competent authority, the property was needed for a

public purpose, *viz*, for the establishment of a State Seed Farm, it was proposed to requisition the property under the provisions of that Act and the owner, the respondent, was called upon to show cause why such requisition should not be made The notice also prevented the owner to dispose of or structurally alter the said property or let it out to a tenant for a period of two months from the date of the notice. From the evidence on record, it transpires that the move for the requisition of the property proceeded from the Department of Agriculture, though certain relevant documents in the chain have not been produced. In pursuance of this notice, the Special Tahsildar, presumably acting under the directions of the Collector, recorded a statement from the respondent. The respondent expressed himself as agreeable to the proposal. In this statement, it was pointed out that the lands together with the wells, pumpset and brick-built buildings thereon had been in the possession of the Department from 1st October, 1957, and it further stated, "the wells, pumpsets and the buildings situate on the lands to be acquired by the Government belong to me alone". A detailed description of the property together with the value set upon it by the owner finds place in this statement, Exhibit B-2, and the owner valued the entire property, including the irrigation facilities thereon, which consisted of the wells, electric machine, oil engine, etc., at Rs 30,000 and the statement ended by saying that the owner agreed to give over the entire property, inclusive of these machinery to the Government In due course, this was followed by an order under sections 3 (2) and 4 of the Act, requisitioning the property and directing surrender and delivery of possession thereof The latter part of this order is obviously a formality, for the Department of Agriculture was on that date in possession of the property by virtue of the lease that had been entered into.

On the same day as the order of requisition, the competent authority proceeded to take proceedings to acquire the property under section 7 of the Act. It is clear from the proceedings that the acquisition of the property must have been in the minds of the appropriate authorities from the beginning, but they purported to follow a somewhat devious course, firstly, by taking on lease and thereafter proceeding to apply the Madras Requisitioning and Acquisition of Immovable Property Act, rather than the Land Acquisition Act Whatever that may be, the acquisition was not objected to and for the purpose of working out the compensation payable the parties entered into an agreement. This agreement is Exhibit B-6 It is common ground that originally it was intended to value the pumpsets, etc, for the purpose of computing the compensation, but in the final agreement that was reached with regard to the compensation, those items were left out. While this feature is depended upon by the appellant as indicating that there was no intention at all to acquire these pieces of machinery, on behalf of the respondent it is pointed out that there was in fact a valuation of these pieces of machinery independently of the valuation of the land, permanent structures thereon, the wells and the trees, and the reason why the pieces of machinery were left out was the view taken by the Collector that they did not form part of the immovable property, which alone could be acquired under the relevant Act, a view which seems to us to be entirely erroneous But we shall deal with that later The respondent was paid a compensation of Rs 29,000 and odd which included the value of the lands, trees, wells, buildings, sheds, etc., and which admittedly excluded the value of the machinery constituting the pumping installation. The compensation was paid in pursuance of Exhibit B-7, the proceedings of the Collector of Chingleput, dated 31st March, 1958, and right from that date, the Department continued to be in possession of the entire premises including the pumping installation.

Nearly a year later, the respondent addressed a communication, Exhibit A-4, dated 17th March, 1959, to the Special Tahsildar, Land Acquisition, pointing out that the entire property, including the pumping installation, had been taken by the Government in pursuance of the acquisition and asked him to furnish the necessary document to enable him to produce it before the Madras State Electricity Board for certain purposes connected with the supply of energy to the premises. He followed this up with a lawyer's notice, Exhibit-A, dated 26th March, 1959, pointing that at the time of taking possession of the lands, the Department of Agriculture had also

taken 'for sale' the electric motor, oil engine, pump with pipes and other accessories, and that though a year had passed, the value of these articles had not been paid. The notice also stated that even the lease amount for a period of six months prior to the acquisition and requisition remained unpaid and called upon the Collector of Chingleput to arrange to pay the amounts. This letter would appear to have been transmitted to the Department of Agriculture and the plaintiff-respondent was directed to contact the District Agricultural Officer for further action. The District Agricultural Officer informed the Collector by Exhibit B-11 that the pumping installations were not required by the Department. This was the letter which was sent in May, 1959 By Exhibit B-10, dated 7th April, 1959, the Collector asked the District Agricultural Officer to ascertain from the plaintiff whether he was agreeable to the dismantlement and removal of the pumping installations. By the middle of May, 1959, the Collector informed the District Agricultural Officer that the lands were acquired and the compensation for the lands, wells, trees and other structures had been paid but that "the oil engine, electric motors, etc., fitted in the wells have not been acquired, as they do not come within the definition of immovable property of the Act". He also stated, "as there is no provision in the Act to acquire the machinery, you may make your own arrangement to purchase them". Following this, the Acting District Agricultural Officer wrote Exhibit B-14 to the Director of Agriculture to say that "the electric motors and the oil engine fitted to the wells in the above farm are not of any use as there is no water in the above wells", and sought instructions and he finally called upon the plaintiff to take back the oil engine, the electric motors and the accessories Presumably, this letter indicated the unwillingness of the Department to pay for the pumping installation. The plaintiff replied through his lawyer by Exhibit B-16, dated 15th June, 1959, refusing to take back the machinery . He pointed out that this was a case of compulsory acquisition of his property and it was only after the lapse of more than 20 months when he demanded the payment of the price that the Department chose to go back upon what was agreed He further pointed out that the State of Madras through the appropriate Department was in possession of these properties and had used all these properties for this lengthy period and he insisted upon being paid the price. Following a notice under section 80, Civil Procedure Code, the suit was laid.

The above sets out in fair detail the contentions of the plaintiff-respondent. On behalf of the defendant, the State of Madras, it was denied that the pumping installation was acquired at all. It was also denied that there was any representation that they would be purchased There was a further denial that the Department in possession used the machinery at all It was alleged that the plaintiff was at liberty to dismantle and remove the machinery at any time he chose and that he defaulted to do so. It was finally alleged that there was at no time any agreement with regard to the purchase, no concluded contract relevant thereto and that any statements found in the correspondence to the contrary would be a misconstruction of the state of affairs.

Upon a careful consideration of the voluminous correspondence and the conduct of the parties, the learned Subordinate Judge came to the conclusion that no doubt there was at least an understanding regarding the purchase of the pumping installation and that there was undoubtedly a transfer of the ownership thereof leaving only the question of price to be determined later He also found that the Government had been in possession and had used the machinery. He categorically expressed his view that there was originally an intention to buy and an intention to sell. He examined the other material and came to the conclusion that the machinery could be valued at Rs. 7,837-3-0 as on 1st April, 1958 and granted a decree therefor together with interest thereon. The State of Madras appeals.

We have been taken through the entire correspondence and we find ourselves totally unable to agree with the learned Additional Government Pleader that there was no agreement to purchase. Even the Collector's letter, Exhibit B-13, explain-

ing that the pumping installation could not be brought within the scope of the Requisitioning and Acquisition Act and that it was for the Department to arrange for the purchase of the pumping installation outside the scope of that Act lends considerable support to the plaintiff's contention Even at the stage of the requisition, when pursuant to the notice under section 3 (1) of the Act, a statement was recorded from the plaintiff by the Special Tahsildar, he clearly stated that the property included the pumping installation and put a value upon the whole property. Mr. C. R. Krishna Rao, for the plaintiff-respondent, points out that this was not a statement submitted by the plaintiff, but was one recorded from him by an authorised officer, and if that officer ascertained the value of the several items and the compensation demanded by the owner in respect of these various items, that would certainly indicate that at that stage, the appropriate authorities intended to acquire the entire property as one unit. It will be noticed that the plaintiff had been running this extensive acreage as an agricultural farm fitted with all the necessary installation and the Government also proposed to acquire it for a seed farm. As a seed farm, it would certainly require these pumping installations for the purpose of irrigation and there is no reason why the Department should have, in any event, at that stage thought it necessary to restrict its acquisition only to the mere land and the buildings. The matter does not rest there Shortly after the notice for requisition, Exhibit B-1, dated 5th January, 1958, was issued, the Special Tahsildar, Land Acquisition, appears to have addressed a communication, dated 24th January, 1958 to Sri K. Dhandayudham, the Assistant Agricultural Engineer That letter has not been produced by the Department In reply to that letter, the Assistant Agricultural Engineer furnished by Exhibits B-34 and B-33 the particulars of the oil engine and electric motors, together with their then value He valued the various items, including the machinery, the pipes and other fittings and gave their then probable price valued on the basis of the then market price less depreciation. This letter is dated, 26th December, 1958, nearly nine months after the acquisition under section 7 of the Act had been made. Even at that stage, which was long before the demand made by the plaintiff for the payment of the value of the pumping installation, there was no suggestion that the Department came out with its present stand that there was at no time any intention to purchase the installation. In the letters addressed by the Department in June, 1959, to the plaintiff, he was only asked to take back the motors and the accessories He was not categorically told that they had not been purchased at all. It was only in Exhibit B-14, dated 1st June, 1959, that the Acting District Agricultural Officer informed the Director of Agriculture that " the electric motors and the oil engine are not of any use as there is no water in the above wells." Though this letter refers to the fact that the Collector had informed him that the machinery could not be acquired under the provisions of that Act, nowhere did he say on the basis of the correspondence or the records of his office that originally the arrangement was that these installations were to be excluded altogether from the scope of the acquisition by the Department, acquisition not in the sense of the Acquisition Act but in its ordinary sense. It was also established both by documentary and oral evidence that these pieces of machinery were repaired by the Department. The Department continued to maintain the service connection and did not ask the party, that is, the owner, to obtain a disconnection. D.W. 1, who was the District Agricultural Officer during the relevant period, stated during his cross-examination, " We were paying varying amounts in various months for these two motor connections That was because of varying consumption." He also admitted that the Department incurred expenditure for repairs for the plaintiff's motors

It seems to us on a careful consideration of the entire material that from the inception it must have been the intention of the appropriate Department to acquire the farm as a going concern including the pumping installation. The fact that the Department maintained the service connection and incurred expenditure for repairs to the machinery establishes that the machinery was used for the purpose of the State Seed Farm and it was only at a very late stage that the Department purported to disclaim the purchase. Even so, we have pointed more than once that the Department pretended to find the machinery useless because there was no water in

the wells It did not say that there had been no water at all at any time, despite the fact that there were no less than three wells, or that the pumping installation was useless. It would certainly be remarkable if the officers of the State went about securing property for agricultural purposes which they found even at the beginning could hardly be used for that purpose for lack of water in the area The fact that even before the acquisition, the Department proceeded to obtain a valuation of the pumping installation by a departmental engineer is a clinching circumstance about the agreement between the parties. The agreement was clearly that the farm should be taken over as a whole including the pumping installation.

We do not think that the Collector was correct in his view that the pumping installation could not have been acquired under the Act as it was not immovable property. Immovable property, both under the Transfer of Property Act and the General Clauses Act, would include anything imbedded in the earth or attached to what is so imbedded The fact it is capable of being removed does not render it any the less immovable property when it is fastened to earth in the manner in which high-power motors and a pumping installation as a whole are imbedded. It may however be that the competent authority acting under the provisions of the Requisitioning and Acquisition of Immovable Property Act, proceeded to acquire only the land, buildings, trees, wells, etc , for both the agreement with regard to the compensation and the award passed by the enquiring officer only covered these items That does not mean that there could not have been a separate agreement with regard to the purchase of the pumping installation In our opinion, there clearly was

The learned Additional Government Pleader urged that on the authority of *The Board of Revenue* v. *Venkataswami*[1], the pumping installation cannot be regarded as immovable property That was a case where stamp duty payable on a lease relating to a touring cinema was in question The decision is a short one and consists of a single paragraph, which runs thus ·

> " The answer to the question depends upon whether the equipment of the touring cinema would fall within the category of immovable property We have no hesitation in holding that it does not. In the question referred to us, the properties are described as collapsible and capable of being removed In the very nature of things, properties of that nature cannot be immovable property. The expression 'permanently fastened' occurring in the question is a little misleading. Actually, some of the machinery or the poles of the tent, may be embedded in the earth, but they are embedded only temporarily and not permanently. If they were permanently fixed, the equipment would not form part of the touring cinema."

It is obvious that this decision depended more upon the manner in which the articles were fastened to the earth and the nature of the touring cinema as a unit This decision cannot be applied to a case where a pumping installation is in question A pumping installation necessarily involves a more permanent fixture to the earth, than a touring cinema does For the matter of that, even walls can be dismantled and replaced, but that would not make them movable property

It was next urged by the learned Additional Government Pleader that it has not been shown that any person authorised to do so entered into the contract of sale and that if the requirements of Article 299 of the Constitution are not complied with, there cannot be an enforceable contract against the State That is no doubt true. But it is not denied by the learned Additional Government Pleader that the Director of Agriculture is a person who could enter into a valid contract on behalf of the State The entire process of acquisition was started by the Department of Agriculture and must obviously be by the Head of the Department, the Director of Agriculture. In entering into a transaction with private parties, the Department acts through its

1. (1955) 2 M.L.J. 215.

various subordinate links and it is not always that the Head of the Department enters into direct negotiations with the parties If the entire activity of the Department as disclosed by the correspondence means anything at all, it means that the departmental officials acting under proper directions issuing from the Head of the Department proceeded with the negotiations in the present case and it must be assumed that when they told the plaintiff that the property would be acquired as a whole, they did so under proper authority As we have pointed out more than once, there has been no express denial of this circumstance, the plea put forward at a late stage being only that the installation was no longer required. That was more or less the view taken in a decision of the Supreme Court in *The State of Bihar* v *Karamchand and Brothers Ltd.*[1] In *K P. Chowdary* v. *State of Madhya Pradesh*[2], their Lordships of the Supreme Court pointed out that in view of Article 299 (1) of the Constitution, there can be no implied contract between the Government and any other person, and that unless the contract is in compliance with that Article, it would be no contract at all. That was a case where a forest contractor failed to complete his bid by payment of the amount and a re-auction was held at his risk. The deficiency occurring therefrom was sought to be recovered from the defaulting bidder The question arose whether there was a contract between the contractor and the Government before the bid at the auction It was held that notwithstanding the acceptance by the contractor of the conditions before the bid and that the contract form had been signed by the contractor as required under the rules, a dispute arose before the contract was concluded, and in those circumstances, there was no valid contract which conformed to the requirements of Article 299 of the Constitution and that the Government could not recover the deficiency on account of the re-sale. But to our minds there is no doubt that the proceedings for the acquisition of the property including the pumping installation had been authorised by the Director of Agriculture, as otherwise it is impossible to understand the steps taken by the various officers of the Department in that regard Though the contract was not in writing and might not come within the scope of Article 299 of the Constitution, for that reason the claim of the plaintiff cannot be defeated, as there is sufficient authority in support of his claim.

In *The State of West Bengal* v *B. K. Mondal and Sons*[3], the question of an unauthorised contract, in the sense that it did not conform to the requirement of Article 299 arose. But their Lordships found that where the Government of a State on the basis of such an unauthorised contract has obtained an advantage and enjoyed it at the expense of another persons, section 70 of the Indian Contract Act, would apply thereto and the claim can be maintained thereunder. This part of the headnote is illuminating:

> " Where a claim for compensation is made by one person against another under section 70, it is not on the basis of any subsisting contract between the parties; it is on the basis of the fact that something was done by the party for another and the said work so done has been voluntarily accepted by the other party In regard to the claim made against the Government of a State under section 70, it may be that in many cases, the work done or the goods delivered are the result of a request made by some officer or other on behalf of the said Government In such a case, the request may be ineffective or invalid, for the reason that the officer making the request was not authorised under section 175 (3) of the Government of India Act, or if the said officer was authorised to make the said request, the request becomes inoperative because it was not followed up by a contract executed in the manner prescribed by section 175 (3) of the Government of India Act. In either case, the thing has been delivered or the work has been done without a contract, and that brings in section 70. It would not be reasonable to suggest that in recognising the claim for compensation under section 70, the Court is either directly or indirectly nullifying the effect of section 175 (3) of the Govern-

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1 (1962) 2 S C J 17. (1962) 1 S C R 827 A.I R 1962 S C 110

2. (1967) 2 S C J 119. (1966) 3 S C R 919: A I R 1967 S C 203.

3. A.I R 1962 S.C 779.

ment of India Act, or treating as valid a contract which is invalid The fields covered by the two provisions are separate and distinct; there is no conflict between the two provisions In the functioning of the vast organisation represented by a modern State, Government Officers have invariably to enter into a variety of contracts which are often of petty nature Sometimes, they may have to act in emergency, and, on many occasions in the pursuit of the welfare policy of the State Government, officers may have to enter into contracts orally or through correspondence, without strictly complying with the provisions of section 175 (3) of the Act If, in all these cases, what is done in pursuance of the contract is for the benefit of the Government and for their use and enjoyment and is otherwise legitimate and proper, section 70 would step in and support a claim for compensation made by the contracting parties, notwithstanding the fact that the contracts had not been made as required by section 175 (3) "

In yet another decision, *The New Marine Coal Co.* v. *Union of India*[1], section 70 of the Contract Act was applied in respect of a contract which contravened the provisions of section 175 (3) of the Government of India Act, following the earlier decision cited above. Their Lordships observed :

" It is also clear under this decision that if in pursuance of the said void contract, the appellant has performed his part, and the respondent has received the benefit of the performance of the contract by the appellant, section 70 would justify the claim made by the appellant against the respondent "

These decisions make it clear that even if there is any invalidity attaching to the contract regarding the purchase, the fact that the Department took the property covered by such invalid contract and used it for a considerable length of time justifies the plaintiff's claim It follows that the conclusions reached by the Court below are correct in so far as this part of the case is concerned.

The learned Additional Government Pleader sought to claim that the valuation was too high and in supporting this argument he relied upon the valuation that was made in Exhibits B-34 and B-33 by the Assistant Agricultural Engineer in December, 1958 It may be noticed that this valuation was never communicated to the plaintiff and a one-sided valuation of that kind cannot be relied upon The learned Subordinate Judge has given adequate reasons for fixing the relief at the figure for which the decree has been made. We see no reason to interfere. The appeal is accordingly dismissed with costs.

S.V.J. *Appeal dismissed.*

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1. (1964) 2 S.C.R. 859 . A.I R. 1964 S.C. 152.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE K. VEERASWAMI AND MR JUSTICE T RAMAPRASADA RAO.

Abdul Hameed Sait (died) by L Rs .. *Appellants**

v

Rajagopala Pandarathar (died) by L Rs and others .. *Respondents.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), *sections* 41, 42, 54-*A and* 64-*B—Properties, subject-matter of mortgage decree, taken over by Government as Estate—Deposit of advance compensation—Application, by mortgagee decree-holder, for payment out—Order of apportionment of compensation—Appeal against that order —Application, by decree-holder, for personal decree within* 3 *years from the date of appellate order—Whether barred—Whether entitled to benefit under section* 64-*B —Limitation.*

Civil Procedure Code (V of 1908), *Order* 34, *rule* 6, *and Limitation Act (IX of* 1908), *Article* 181*—Application for personal decree—Limitation*

The proceeding under section 42 came to an end by the order, dated 19th November, 1952, but the appeals arising there out were disposed of by this Court only on 5th December, 1956. The appellant is entitled to the benefit of section 64-B, for, the appeals arising out of the apportionment order had been disposed of by this Court only on 5th December, 1956, so that the application for a personal decree filed on 1st August, 1958, was within three years. Further, when the final compensation was deposited on 24th June, 1958, which is within two years from 5th December, 1956, the appellant is again entitled to the benefit of section 65-B (on facts, held, since the proceedings arising out of the application for apportionment of the final compensation are still pending in the form of appeals in this Court, no question of limitation would at all arise in relation to the application for passing a personal decree)

(On a construction of the memorandum filed by the appellant before the Tribunal, it was held that the intention of the plaintiff was not thereby to give up his security)

Appeal against the Decree of the Court of the Subordinate Judge, Thanjavur, in I A. No 596 of 1968 in Original Suit No. 39 of 1940, dated 26th February, 1960

A K Sreeraman, for Appellants.

K S. Desikan and *K. Raman,* for Respondent No. 1

P S Sarangapani Iyengar, for Respondent No 2

The Judgment of the Court was delivered by

Veeraswami, J —This is a plaintiff's appeal directed against an order of the Subordinate Judge of Thanjavur dismissing his application for a personal decree against the first defendant Pending the appeal, the first defendant died and his legal representatives have been brought on record The suit was instituted in 1940 to enforce a mortgage that had been executed by the first defendant on three villages in Gandarvakottai Zamindari On 20th August, 1941, a preliminary decree was passed for Rs 86,302-6-8 A final decree followed on 9th November, 1943 In 1949 the last execution application was taken out which was disposed of by a final order, dated 6th January, 1950 On 3rd January, 1951, the three villages, which formed the security under the mortgage, were notified as an estate and taken over with effect from that date under the provisions of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948. On 27th June, 1951, advance compensation in a sum of Rs 6,793 was deposited with the Estates Abolition Tribunal, West Thanjavur, under section 54-A of the Act. The plaintiff applied on 7th September, 1951, under section 42 for payment out of the compensation to him. There were rival claims made by the two junior wives of the mortgagor By an order dated 19th

* Appeal No. 80 of 1961. 12th February, 1968.

November, 1952, the Tribunal apportioned the compensation as between the plaintiff on the one hand and the two defendants on the other. But the plaintiff got only a sum of Rs. 5,437 Dissatisfied with the apportionment, all the three claimants preferred separate appeals to this Court which were all dismissed by a common judgment on 5th December, 1956 On 1st August, 1958, the plaintiff applied under Order 34, rule 6 of the Code of Civil Procedure, for a personal decree, out of which, as we said, the present appeal arises To complete the narration, the final compensation payable by the Government was deposited with the Tribunal on 24th June, 1958

The Subordinate Judge dismissed the application for a personal decree on the view that it was out of time He thought that, on a construction of a memorandum filed by the plaintiff before the Tribunal on 25th August, 1952, he gave up his security and was prepared to receive repayment from the compensation deposited on the footing that he was an unsecured creditor, and that, therefore, the cause of action for applying for a personal decree arose then. According to the learned Judge, under Article 181 of the Limitation Act, the application was barred because the right to apply accrued on 25th August, 1952 itself

Learned Counsel for the appellant argues that the view of the Tribunal is erroneous. He says (1) that the memorandum referred to by the Subordinate Judge does not lend itself to the construction he placed on it, (2) that on a reference to relative statutory provisions, the application for personal decree was not out of time, and (3) that in any case, as the plaintiff has not given up his security and as the final compensation deposited on 24th June, 1958 still remains to be apportioned, he cannot be said to have exhausted the substituted security in the form of the compensation and therefore also the Subordinate Judge was wrong in his view that the application was out of time Before we deal with these contentions seriatim, we will notice the provisions of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948. Section 2 defines an 'estate' as meaning a zamindari, and there is no dispute that the villages in question constituted such an estate Section 3 provides for notification of an estate and lays down its consequences One of the consequences is that on and from the notified date, the entire estate notified vests in the Government absolutely and free of all encumbrances A further consequence which follows from the first may be mentioned, that all rights and interests created in or over the estate before the notified date by the principal or any other landholder should as against the Government cease and determine There are provisions which regulate computation and payment of compensation for the estate notified and taken over. Section 41 provides for deposit and apportionment of the compensation On making such deposit, the Government shall be deemed to have been completely discharged in respect of all claims to, or enforceable against, the compensation. Provision is made by section 42 enabling settlement of claims by creditors, both secured and unsecured, and others who have a claim against the landholder. Section 44 (1) in effect deals with priority of payment as between secured and unsecured creditors. The time and manner of depositing advance compensation has been provided by section 54-A. Having made these provisions, the Act erects certain bar on proceedings. Section 59 (1) is to the effect that no claim or liability enforceable immediately before the notified date against the principal or any other landholder of an estate, or against any other person whose rights stand transferred to the Government in pursuance of section 3, clause (*b*), shall, on or after that date, be enforceable against the interest he had in the estate; and all such claims and liabilities shall after the date on which the deposit in pursuance of section 54-A is made, be enforceable against the interim payments or the compensation and against his other property, if any, to the same extent to which such claims and liabilities were enforceable against the interim payments or compensation or other property. Sub-section (2) says that no Court shall, on or after the notified date, order or continue execution in respect of any decree or order passed against the principal or any other landholder or any other person aforesaid, against the interest he had in the estate; and execution shall be ordered or continued in such cases in conformity with the provisions of sub-section (1), only as

against the interim payments or against the compensation or other sum or sums paid or payable to him as aforesaid or against his other property if any One other provision which we have to notice is section 64-B which runs.

> " In computing the period of limitation for any suit or application filed in a civil Court by a creditor in respect of any matter which was the subject of a proceeding under any of the following sections, namely, 42, 43, 44, 45, 46, 48, 49, 50, 51, 54-A and 54-B, the period commencing on the notified date and ending with the date on which the deposit in pursuance of section 54-A is made, and the time during which such proceedings were pending as well as the time taken for obtaining certified copies of the order passed in such proceeding shall be excluded."

The contention for the appellant is that he is entitled to the benefit of section 64-B It seems to us that the contention is well-founded. The proceeding under section 42 came to an end by the order, dated 19th November, 1952, but the appeals arising there out were disposed of by this Court only on 5th December, 1956. Assuming that this was the date on which the plaintiff's cause of action for applying for a personal decree arose, his application filed on 1st August, 1958 being within three years, it would be within time But we note that the final compensation having been deposited on 24th June, 1958, the plaintiff again applied for payment and the proceedings arising from that are still pending in this Court in the form of appeals Learned Counsel for the appellant also relied on section 59 (1) and *Krishna Prasad* v. *Gouri Kumari Devi*[1] Section 59 (1) raises a bar to any claim or liability against the landholder being enforced against the interest he had in the estate which by reason of the notification has vested in the State. But the section itself makes it clear that all the same such claim or liability can be enforced, after the date on which the deposit under section 54-A is made, against interim payments or the compensation or against the other property of the landholder. So too sub-section (2) of section 59 only bars an execution against the interest that has vested in the Government by reason of the notification. It, however, allows execution or its continuance in conformity with sub-section (1) of section 59 That is to say, execution could be levied against interim payments or compensation or against the property of the landholder other than the interest vested in the Government as a result of the notification It may be seen, therefore, that subsequent to the deposit under section 54-A which was on 27th June, 1951, the plaintiff was at liberty to proceed against the interim payment or compensation or against the other properties of the first defendant Section 4 (*d*) of the Bihar Land Reforms Act, which was the subject-matter of *Krishna Prasad* v *Gouri Kumari Devi*[2], was differently worded. That section provided that no suit should lie in any civil Court for recovery of any money due from such proprietor or tenure-holder the payment of which was secured by a mortgage of, or was a charge on, such estate or tenure and all suits and proceedings for the recovery of any such money which might be pending on the date of vesting should be dropped. The Supreme Court held on a construction of these provisions that the bar extended also to execution proceedings in which the decree-holder sought to recover from properties other than those which had vested in the State The other question which this case decided turned on the terms of the preliminary decree which provided that if only the decretal amount was not fully satisfied from the mortgaged properties, the decree-holder could apply for a personal decree against the judgment-debtor In our opinion, therefore, this decision does not assist the appellant so far as the statutory provisions in the Madras Act go. As we said, the appellant is entitled to the benefit of section 64-B, for, the appeals arising out of the apportionment order had been disposed of by this Court only on 5th December, 1956, so that the application for a personal decree filed on 1st August, 1958 was within three years Further, when the final compensation was deposited on 24th June, 1958, which is within two years from 5th December, 1956, the appellant is again entitled to the benefit of section 64-B. As a matter of fact, since the proceedings arising out of the

1. A.I.R. 1962 S.C. 1464. 2. A.I.R. 1962 S.C. 1464.

application for apportionment of the final compensation are still pending in the form of appeals in this Court, no question of limitation would at all arise in relation to the application for passing a personal decree.

Apart from this aspect, on a construction of the memorandum filed by the appellant before the Tribunal, we are of opinion that the intention of the plaintiff was not thereby to give up his security. No doubt a first look at the language employed by the memorandum may not give that impression. But when the memorandum is looked at in the background of the relative statutory provisions in the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, it is clear to our minds that what the plaintiff meant by the memorandum was that in view of the statutory effect, he would claim to be paid out of the compensation and not from the hypotheca which had been notified and as a result had vested absolutely in the Government free of all encumbrances. The memorandum no doubt has not been happily phrased But we are of the view that the intention of the plaintiff is unmistakable. There was absolutely no reason why, if the security was available to him, he should give it up. He mentioned in the memorandum that the would pass off as an unsecured creditor because the security was no longer available in its original form. On that construction, the plaintiff could apply for a personal decree only after exhausting his claim against the compensation deposited with the Tribunal. That is the effect of Order 34, rule 6 of the Code of Civil Procedure. That covers all the three points raised on behalf of the appellant which we accept as well-founded.

We may add that one of the claimants contended that the application for passing a personal decree is premature. But it is not on this ground the learned Subordinate Judge dismissed the plaintiff's application As a matter of fact, the final compensation has also been apportioned and from the relative order, the aggrieved parties including the plaintiff have preferred appeals which are pending here. We are, therefore, not disposed to think that the plaintiff's application is premature.

The appeal is allowed with costs, one set.

S.V.J. ——— *Appeal allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE N. KRISHNASWAMI REDDY.

Sheik Abubaker and another . *Petitioners.**

Madras City Police Act (III of 1888), *section* 65—*Person found to be in possession of huge amount—No reason to believe that property in possession is stolen property or property fraudulently obtained—Inability to account for such possession—Whether amounts liable to be convicted under section* 65.

The prosecution, to sustain the conviction under section 65, must first prove that there is reason to believe, property in possession of a person to be stolen property or property fraudulently obtained, before such a person is called upon to account for such possession. If a person is unable to account for the possession of the property that circumstance alone cannot be taken for believing that it is stolen property or property obtained by fraudulent means Section 65 makes it clear that there must be reason to believe that the property in possession of a person is stolen property or property fraudulently obtained and that the person in possession of such property fails to account for such possession satisfactorily. This section will not cover a case where there is no reason to believe that the property is either stolen property or property fraudulently obtained Even if there is reason to believe that the property might have been obtained by illegal or unlawful means, unless it is shown that there is reason to believe that either it is stolen or fraudulently obtained, the conviction under section 65 of the Act cannot be sustained. Mere possession of property, for which a person is unable to account for, will not be sufficient to

* Crl.R.C. No 319 of 1968.
(Crl R.P. No. 313 of 1968.) 16th April, 1968.

sustain a conviction under section 65 of the Act unless it is also established that there is reason to believe that such property was stolen property or property obtained by fraudulent means.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the District Magistrate (J), Tiruchirapalli, dated 8th February, 1968 in C A. No 10 of 1968 (C C No. 3125 of 1967, Sub-Magistrate No 1 (J), Tiruchirapalli).

G. Gopalaswami, for Petitioners.

Calvin Jacob, for the Public Prosecutor, for State

The Court made the following

ORDER.—The petitioners are accused 1 and 2 in C C. No 3125 of 1967 on the file of Sub-Magistrate No 1, Tiruchirapalli They were convicted under section 65 of the Madras City Police Act and each of them was sentenced to pay a fine of Rs 50 and further, a sum of Rs 49,750 alleged to have been seized from them was confiscated On appeal, the learned District Magistrate, Tiruchirapalli, confirmed the conviction and sentence.

The short point that arises in this revision petition is whether the conviction under section 65 of the Madras City Police Act, could be sustained on the facts of this case It is, therefore, necessary to briefly note the facts of the prosecution case: P.W 3, the Inspector of Police, Tiruchirapalli Town, on information, raided the house bearing door No. 24, Bharathi Street, in East Bouleward Road, Tiruchirapalli, at about 4-30 P M in the presence of P.W. 2 Narayanan and another. P W 3 found the petitioners in possession of a trunk box (M O. 2) containing cash of Rs. 27,000 in currency (M O. 4) and another plastic bag (M O 1) containing cash of Rs 22,750 in currency (M O. 3) and some clothes (M Os 5 series). The petitioners produced their account books (M O 6 series) As the petitioners did not account for the possession of such a huge amount and as the account books also did not show as to how they happened to have such large amounts with them, P W. 3 arrested the petitioners and seized the cash under a house search list P.W 3 filed a charge-sheet against the petitioners under section 65 of the Madras City Police Act P W. 1, the karnam of Keelakarai stated that the petitioners did not possess any property in Keelakarai and that the second petitioner was in arrears of income-tax to the tune of Rs. 40,000 or Rs. 50,000 The first petitioner (accused-1) claimed the entire money seized by P.W 3 as his. The second petitioner (accused-2) contended that the case was foisted on him. The petitioners examined one defence witness D W. 1 Mannathambi, a partner of the L K S Jewellery, who stated that he advanced a loan of Rs. 50,000 to the first petitioner under a promissory note o 1nst July, 1967.

The lower Courts rejected the evidence of D W. 1 and found the petitioners guilty under section 65 of the Madras City Police Act There are absolutely no materials in this case to show that there is reason to believe that the cash in possession of the petitioners was stolen property or property fraudulently obtained It is no doubt true that the petitioners were in possession of a huge amount. That circumstance alone will not be enough to believe that it is stolen property or property obtained by fraudulent means The prosecution, to sustain the conviction under section 65, must first prove that there is reason to believe, property in possession of a person to be stolen property or property fraudulently obtained, before such a person is called upon to account for such possession If a person is unable to account for the possession of the property, that circumstance alone cannot be taken for believing that it is stolen property or property obtained by fraudulent means Section 65 of the Madras City Police Act reads thus:

"Whoever is found in possession or is proved to have been in possession of anything which there is reason to believe to be stolen property or property fraudulently obtained and for the possession of which he fails satisfactorily to account, shall be liable on conviction to fine not exceeding one hundred rupees or to imprisonment not exceeding three months".

This section makes it clear that there must be reason to believe that the property in possession of a person is stolen property or property fraudulently obtained and that the person in possession of such property fails to account for such possession satisfactorily This section will not cover a case where there is no reason to believe that the property is either stolen property or property fraudulently obtained. Even if there is reason to believe that the property might have been obtained by illegal or unlawful means, unless it is shown that there is reason to believe that either it is stolen or fraudulently obtained, the conviction under section 65 of the City Police Act cannot be sustained For instance, if a prostitute is in possession of large sums of money and she is not able to account for such possession for some reason or other, it cannot be said that that amount can be believed to be either stolen property or property obtained by fraudulent means It is possible that she should have obtained the money by illegal means, namely, by offering her body for hire. In such a case, inability to account for the possession of the property satisfactorily, cannot lead to an inference for the belief that the property is either stolen or obtained fraudulently. It is, therefore, possible even in this case, that the petitioners would have obtained the money by some improper dealings and that they have not accounted for it, with a view to avoid payment of tax Mere possession of property, for which a person is unable to account for, will not be sufficient to sustain a conviction under section 65 of the Madras City Police Act unless it is also established that there is reason to believe that such property was stolen property or property obtained by fraudulent means.

In *Vanchalinga Devan*, In re[1], Srinivasan, J , held that section 65 of the Madras City Police Act requires clearly that there should be reason to believe the property to be either stolen or to have been fraudulently obtained, before the person in possession can be called upon to account for his possession.

In *Public Prosecutor* v *Subramaniam*[2], Ramakrishnan, J , held that before a person can be convicted under section 65 of the City Police Act, the prosecution must adduce, besides the evidence about possession, evidence from which one can reasonably believe the property to be stolen or property to be fraudulently obtained, and thereafter the Court can be required to take into consideration the omission or failure of the accused to account satisfactorily for his possession of the property

Again, Ramakrishnan, J , in *Ayyavoo Chetty*, In re,[3] following his earlier decision held that section 65 of the City Police Act is not intended to deal with offences of hoarding and profiteering in essential commodities and that it only deals with the offence of possessing stolen property or property fraudulently obtained

With respect, I agree with the principle laid down in the above decisions. As I have already found, there are no materials to hold that the currency notes in the possession of the petitioners could be believed to be stolen property or property obtained by fraudulent means.

The conviction and sentence are set aside and the petitioners are acquitted. The revision case is allowed The fine amounts, if paid, will be refunded to them. The sum of Rs. 49,750 confiscated by the Magistrate is directed to be returned forthwith to the first petitioner (accused 1) since the second petitioner (accused 2) has admitted that the amount belonged to the first petitioner (accused 1).

S.V.J.

Revision allowed;
Conviction and sentence set aside.

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1 (1962) M.L J (Crl) 501
2. (1964) M L J (Crl) 639 . (1964) 2 M L J 619.
3 (1965) 2 M L J. 181 (1965) M.L.J (Crl.) 470 . I.L.R (1964) 2 Mad. 981.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. VENKATARAMAN.

Rangaswami Naicker .. *Appellant* *

v.

Rangammal (died by proposed L. R. and another) .. *Respondents.*

Civil Procedure Code (V of 1908), *section* 47, *and* 146 *and Order* 21, *rule* 16—*Applicability of—Properties, subject-matter of suit, bequeathed under a will, by decree-holder —No reference to the suit—Execution petition by legatee—Maintainability of—Applicability of exact provision —Jurisdiction of executing Court to determine genuineness of will.*

When the Applicant claims to be the legal representative of the decree holder and further claims to be entitled to execute the decree in that capacity, the question has necessarily to be tried under section 47 by the executing Court. Section 47 (2), no doubt, says that the executing Court may treat a proceeding under that section as a suit, but where the question is one primarily relating to execution, there is no need to convert it into a suit. Apart from this there is no provision of law which ousts the jurisdiction of the executing Court under section 47, Civil Procedure Code (on facts held, section 213 of the Indian Succession Act is inapplicable, because, the will was executed outside the City of Madras and the properties also are situated outside the City).

Regarding the applicability of the exact provision, on facts, it was held, Order 21, rule 16, Civil Procedure Code, will not apply because the will does not assign the decree, in fact, it does not refer to the suit at all. Hence there has not been any assignment in writing or by operation of law under Order 21, rule 16. But, the applicant can maintain the petition under section 146, Civil Procedure Code, as a person claiming under the decree-holder.

Section 146, Civil Procedure Code, is very wide in its terms and would permit a transferee like the applicant (respondent in the C.M.S.A.) to maintain an execution petition, even though the decree as such has not been transferred to him under Order 21, rule 16, Civil Procedure Code.

The executing Court is the proper Court to determine the question whether the will is genuine and the property in question was bequeathed to the claimant.

Appeal against the Appellate Order of the Court of the (Additional) District Judge of Coimbatore, dated 16th August, 1965 and made in C.M.A. No. 105 of 1964 (E.P. No. 860 of 1963 in O.S. 431 of 1962 (Prl.), D.M.C., Coimbatore.

P. Venkataraman for *G. Ramanujam* and *J. Kanakaraj*, for Appellant.

T. R. Ramachandran, for Respondent.

The Court made the following

ORDER.—This appeal arises out of proceedings in the execution of the decree in O.S. No. 431 of 1962 on the file of the District Munsif, Coimbatore. The suit was instituted by one Rangammal, A Hindu widow, against her husband's brother's son, Ramaswami Naicker, the appellant herein, to recover possession of 3.36 acres of land in a village in Coimbatore. The suit was compromised on 28th June, 1963, according to which the plaintiff was entitled to a specified extent of 1 acre 12 cents and the defendant to the remainder. Rangammal, however died the very next day after the decree. Earlier, on 17th October, 1962, she had executed a registered will in favour of her brother, Venkataswami Naidu, bequeathing the subject-matter of the suit, namely 3.36 acres, and another house, not concerned in the suit. The will, of course, would take effect only on her death. Founding on the will, the legatee Venkataswami Naidu, filed E.P. No. 860 of 1963 out of which this appeal arises, to execute the decree. In column 1, he described himself as legal representative of the

* A.A.A.O. No. 79 of 1965. 26th June, 1968.

deceased Rangammal, the decree-holder In column 11, he prayed that he might be recognised as the heir (legal representative) of the decree holder Rangammal, and possession might be delivered to him under Order 21, rule 35, Civil Procedure Code.

The judgment debtor, Rangaswami Naicker, resisted the petition, on the grounds (1) that the will was not genuine, (2) that its genuineness had to be established in proceedings other than in execution of O S No. 431 of 1962 and (3) that but for the will he would be the heir-at-law of Rangammal under the Hindu Law.

The question whether the genuineness of the will could be gone into in the execution proceedings was tried as a preliminary point. The learned District Munsif held that it could be gone into in the execution proceeding itself in view of sections 47 and 146, Civil Procedure Code The view was upheld on appeal by the learned District Judge, hence this further appeal by Rangaswami Naicker. The contention of his learned Counsel is that Venkataswami Naidu should be referred to a separate suit to establish the will and only thereafter he could be allowed to execute the decree. No authority however is cited for this proposition and this proposition is opposed to the statutory provisions like sections 47 and 146, Civil Procedure Code. When Venkataswami Naidu claims to be the legal representative of the decree holder Rangammal and further claims to be entitled to execute the decree in that capacity, the question has necessarily to be tried under section 47 by by executing Court. Section 47 (2), no doubt, says that the executing Court may treat a proceeding under that section as a suit, but where the question is one primarily relating to execution, there is no need to convert it into a suit. Apart from this there is no provision of law which ousts the jurisdiction of the executing Court under section 47, Civil Procedure Code Thus section 213 of the Indian Succession Act will not apply so as to oust the jurisdiction of the executing Court, because it clearly enacts that so far as a will made by a Hindu is concerned, it will only apply where the will is of the classes specified in clauses (*a*) and (*b*) of section 57, and if we turn to clauses (*a*) and (*b*) of section 57, they refer to a will executed within the City of Madras or relating to property situated in Madras City But here, the will was executed outside the City of Madras and the properties also are situated in Coimbatore District Hence section 213 will not apply. See also the decision in *Behari Lal* v. *Karam Chand*[1].

It is thus clear that it is the executing Court which has to determine whether Venkataswami Naidu is the legal representative under section 47. A question may arise about the exact provision under which the Court may proceed. The possible provisions are Order 21, rule 16 and section 146, Civil Procedure Code, Order 21, rule 16, Civil Procedure Code will not apply because the will does not assign the decree; in fact, it does not refer to the suit at all. Hence there has not been any assignment in writing or by operation of law under Order 21, rule 16, Civil Procedure Code, according to the criterion laid down by their Lordships of the Supreme Court in *Jugal Kishore Saraf* v. *Raw Cotton Ltd.*[2], But, Venkataswami Naidu can maintain the petition under section 146, Civil Procedure Code, as a person claiming under Rangammal. This is clear from the above decision itself and also the decision in *The Andhra Bank Ltd.* v. *R. Srinivasan*[3], where their Lordships held that even a partial legatee under a will can be legal representative under section 2 (11), Civil Procedure Code. It has been held in a number of cases following *Jugal Kishore Saraf* v. *Raw Cotton Ltd.*[2], that where a transferee of the subject-matter of the suit is not a transferee of the decree and therefore cannot apply under Order 21, rule 16, Civil Procedure Code, he can nevertheless apply under section 146, Civil Procedure Code, to execute the decree, See *Saila Bala Dassi* v. *Nirmala Sundari Dassi*[4], *Chinnan Kesavan* v *Gouri Amma*[5], *Mani Davasia* v. *Varkey Scaria*[6], *Ramnath* v. *Anardei Devi*[7]

1. A.I R. 1968 Punj 108

2. (1955) S C J. 371 . (1955) 1 M L J. (S C). 220 . (1955) An W.R. (S C.) 220'. (1955) 1 S C R 1369.

3 (1962) 2 S C J. 676 : (1963) 1 M L J. (S C. 14 ; (1963) 1 An W R. (S.C) 14 . (1962) 3 S.C.R. 391 at pp. 410, 413.

4 (1958) S C J. 743 . (1958) 2 An.W.R. (S C) 99 (1958) 2 M L J. (S C) 99 : (1958) S C R 1287.

5. I L R (1958) Ker. 1159 : A.I.R. 1959 Ker 180

6. (1960) Ker.L T. 1077.

7. A.I R 1964 Pat 311.

Satyanarayana v *Arun Malk*[1], and *Ponniah Pillai* v *T. Natarajan*[2], There is only one decision in which a dissenting note has been struck and that is by Jagdisan, J., *Sampath Mudaliar* v. *Sakunthala Ammal*[3], where the learned Judge held that once a decree is passed, unless there is an assignment in writing of the decree to satisfy Order 21, rule 16, Civil Procedure Code, . Section 146 cannot be invoked and that section 146 would be controlled by Order 21, rule 16 Civil Procedure Code. For the reasons discussed in the decisions cited above, I respectfully dissent from the view taken by Jagadisan, J., and agree with the view of Kailasam, J., in *Ponniah Pillai* v. *Natarajan*[2], that as pointed out by their Lordships of the Supreme Court, section 146 is very wide in its terms and would permit a transferee like the respondent herein to maintain an execution petition, even though the decree as such has not been transferred to him under Order 21, rule 16, Civil Procedure Code. Their Lordships have emphasised that section 146, Civil Procedure Code, will apply so long as there is no prohibition to the contrary There is no such prohibition here It may also be pointed out that Das, J, points out at pages 1405 and 1406 in *Jagul Kishore Saraf* v. *Raw Cotton Ltd.*[4], that in such a case, it is the duty of the executing Court alone under section 47 to determine the question whether the transferee person seeking to execute the decree could be said to claim under the decree holder under section 146.

It is quite clear therefore that the executing Court is the proper Court to determine the question whether the will is genuine and the property in question was bequeathed to the claimant Venkataswami Naidu thereunder The appeal is therefore dismissed, but without costs No leave

S V.J *Appeal dismissed;*
No leave.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE N. KRISHNASWAMY REDDY.

The Rt. Rev. George Devadoss and another .. *Petitioners**

v.

Luke D. Asirvatham .. *Respondent.*

Penal Code (*XLV of* 1860), *sections* 406 *and* 477-*A*—*Offences under*—*Money collected for specific purpose*—*Persons freely donating money without any condition as to how it should be used*—*Whether amounts to entrustment*—*Non-utilisation of such money for the purpose for which it was collected*—*Whether person in receipt of such money commits offence under section* 406 *or* 477-*A*

In a case of entrustment, the ownership of the property is retained by the person who entrusts the same Before there can be any entrustment, there must be an obligation annexed to the ownership of the property and a confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another or of another and the owner.

Held, on facts, that the heads of institutions and persons belonging to Christian community freely donated money without any condition as to how the oney should be used. Once the money came into the hands of the Bishop, it undoubtedly became the property of the Bishop. It cannot be said that the moneys were entrusted to the Bishop by the people who donated it. Even on facts, the evidence appears to be that the money was utilised for the Cyclone Relief Fund

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to quash the proceedings in C.C.

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1. (1964) 2 An W R. 81 : A I R. 1965 Audh Pra 81
2. (1967) 2 M L J 281 A I R 1968 Mad. 190.
3. (1964) 2 M L J 563 : I L R (1964) 2 Mad 363.
4. (1955) S C J 371 : (1955) 1 M L J. (S C) 220 (1955) 1 An W R (S C) 220 : (1955) 1 S C R. 1369

* Crl M P No 470 of 1968. 19th July, 1968.

No. 36 of 1966 on the file of the Court of the Additional First Class Magistrate No. 1 Madurai.

S. Mohankumaramangalam for *N. T Vanamamalai* and *V Gopinath*, for Petitioner

The Advocate-General for *K R Natarajan*, for Respondent

The Court made the following

ORDER —This petition has been filed to quash the charge and the proceedings in C C No 36 of 1966 against the petitioners on the file of the Court of the Additional First Class Magistrate No. 1, Madurai, on the grounds that no offence has been made out on the evidence placed before the Court and that the process of law has been abused by the complainant.

The relevant facts for the appreciation of the contentions raised by the learned Counsel for the petitioners disclosed in the affidavit filed by the petitioners are briefly these· The first petitioner, Rt. Rev. George Devadoss is the Bishop of Madurai-Ramnad Diocese The second petitioner, G G Joshua was Treasurer, Cyclone Relief Committee of the Madurai-Ramnad Diocese The Diocese is managed by the Executive Committee which administers all the funds of the Diocese and P.W. 5 Devaprakasam, during the relevant period, was the Secretary. Different standing committees are constituted, of which one is the Emergency Relief Committee which supervises distribution of relief Of this Committee, P.W 4 B. A Daniel is the convener. P W 3 Navarathnam is a member and the first petitioner (the Bishop) is the Chairman There was a cyclone in December, 1964 in Ramnad District mainly in Dhanushkodi, Pamban and other places which cansed great havoc to lives and property. Thereupon, the first petitioner issued an appeal to the Christian institutions and heads of institutions for funds. In response to the appeal a sum of Rs 34,615-67P was received by the first petitioner and sent to the Diocesan Treasury for affording relief to the institutions, churches, schools and individuals. A sub-committee called the Cyclone Relief Committee under the Emergency Relief Committee was formed P Ws 3 and 4 were the members of the Sub-Committee and the 1st petitioner was its Chairman. The Cyclone Relief Committee after its formation considered the appeals received for relief and sanctioned amounts to be paid to various institutions, schools, churches and also private individuals who were affected by the said cyclone. The last meeting of the sub-committee was on 30th August, 1965 The proceedings of this Committee sanctioning payments were communicated by P W 4 to the various local pastors within the Diocese, heads of institutions and also Chairman of the local Councils P W. 4 as convener of the Sub-Committee had also issued directions to the Treasurer (the second petitioner herein) to issue cheques and payments on various occasions to the tune of several thousands enabling the Pastors and the Chairman of the local councils to make the payments to the individuals and institutions, on the spot and payments were made by the second petitioner on proper vouchers Finally, in October, 1964, the Executive Committee of the Diocese which is the principal committee in charge of the administration of the funds of the Diocese had approved the statements of collections and expenditure and accepted the same as correctly made by the Committee

Mr Luke D. Asirvatham, one of the Secretaries, of the Association called the Diocesan Welfare Association at Madurai, filed a private complaint against the petitioners in January, 1966 stating that they had committed criminal breach of trust in respect of the entire amount collected towards the Cyclone Relief Committee fund excepting Rs 1,000 which was handed over to the Collector of Ramnad. The said complaint was taken on file on 17th January, 1966 by the District Magistrate, Madurai and transferred to the Court of the Additional First Class Magistrate, Madurai The Additional First Class, Magistrate, Madurai had framed charges against the petitioners under sections 406 and 477-A, Indian Penal Code As this was a warrant case, witnesses were examined before the charges were framed.

The case as disclosed by the evidence let in by the prosecution is that the petitioners have not used the amounts collected for the purpose for which they were

received, namely, to help people affected by the cyclone and that the moneys were distributed to the favourites of the first petitioner. So far as the receipts are concerned, there is no dispute that the amount collected towards the Cyclone Relief Fund is Rs 34,615-67P. of which a sum of Rs 1,000 was given to the District Collector, Ramnad, for using the same for relief of the people affected by the cyclone P W. 4, one of the members of the Cyclone Relief Committee giving evidence on the side of the prosecution stated as follows, (which would be relevant for the purpose of considering whether any offence under section 406, Indian Penal Code or 477, Indian Penal Code, is made out against the petitioners ;)

> " Most of the places mentioned in Exhibits P-1 and P-9 which were affected by cyclone had been granted relief A-1 placed the relief items before committee and obtained sanction. . ... At the recommendation of A-2 payments were made through pastors and N C C Chairman. I have communicated to pastors and N. C C Chairman None of them have stated they have not received the payment. .... . All of us have acted in good faith and in best of my knowledge and ability I have helped the victims The appeal of A-1 has been addressed to presbyters and heads of institutions and not to individuals. I strongly felt that A-1 and myself and others helped people as we desired "

P W. 5, a retired pastor in the Church of South India as witness for prosecution stated as follows —

> " A-1 received gift of wheat, blankets and clothing and not I. I do not know as to how they are to be distributed except to the actual victims of the cyclone throughout the district I do not know the places they were distributed......I have nothing to do with the disbursement of the funds .... . A-1 issued appeals etc , in the capacity of Bishop."

It is not the case of the prosecution that the money collected towards the Cyclone Relief Fund was not distributed According to the prosecution, the money was not distributed to the genuine persons affected by the cyclone, but it was distributed to the favourites of accused-1. The statements of P Ws 4 and 5 would disclose that accused-1 appealed to the Christian Community and the Heads of Institutions to send their contributions for the Cyclone Relief Fund in his capacity as Bishop. The evidence of P W. 4 is clear, as seen above, that disbursements were made in places affected by cyclone and that sanction was obtained for the said disbursements. It was also stated by P W. 4 that all of them acted in good faith in making disbursements. Even on facts, the evidence appears to be that the money was utilised for the Cyclone Relief Fund

The main question raised by the learned Counsel was that even assuming the facts to be true that the money was not utilised for the purpose for which it was collected and that accused-1, the first petitioner paid them to his favourites, it could not be said that an offence under section 406, Indian Penal Code, namely, criminal breach of trust or under section 477-A, Indian Penal Code, is made out He contends that once the parties had parted with their money in pursuance of the appeal made by the Bishop, that money became the property of the Bishop and the person who gave the money, does not retain any interest in that money and that, therefore, the question of entrustment, in those circumstances, will not arise. There seems to be force in this argument It transpires from the facts of this case, that the Heads of Institutions and persons belonging to Christian community freely donated money without any condition as to how the money should be used Once the money came into the hands of the Bishop, it undoubtedly became the property of the Bishop. It cannot be said that the moneys were entrusted to the Bishop by the people who donated it.

Once the money became the property of the Bishop which ultimately goes to the Diocese, the Executive Committee would administer the funds of the Diocese. It may be that if moneys collected for a specific purpose namely in this case, to be used for the benefit of the persons affected by the cyclone, were not used for that purpose, the Bishop of the Diocese would be subjected to criticism or condemnation.

by the donors. That is altogether a different matter. The Supreme Court in *State of Gujarat* v. *Jaswantlal*[1], had observed that the expression "entrustment" carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner and that the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them This makes it clear that in a case of entrustment, the ownership of the property is retained by the person who entrusts the same As already noted, the donors have parted with their money without any obligation or condition annexed to it Before there can be any entrustment, there must be an obligation annexed to the ownership of the property and a confidence resposed in and accepted by the owner or declared and accepted by him for the benefit of another or of another and the owner.

In the result, the proceedings in C C.No 36 of 1966 pending before the Additional First Class Magistrate No 1, Madurai, have to be quashed on the ground that the facts in this case do not constitute any offence Accordingly, the proceedings are quashed and the petition is allowed

S.V.J. — *Petition allowed; Proceedings quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT.—MR JUSTICE P. S KAILASAM

E. R. Sitarama Reddiar .. *Petitioner*[*]

v.

The Revenue Divisional Officer, Vridhachalam and others .. *Respondents*

Madras Panchayats Act (XXXV of 1958), *sections* 2 (17), 153—*Panchayat Union Council—Chairman—Motion of no-confidence—Voting by co-opted members—Valid—Voting by a President of a panchayat, whose election set aside by Election Commissioner, but order stayed by High Court in writ petition—Co-opting of women and scheduled caste or tribe members—Empowered by the proviso to section* 12—*Validity—Statute—Interpretation—Proviso to a section—Excepting or qualifying proviso or a fresh enactment*

In a petition filed by the Chairman of a Panchayat Union Council, against whom a motion of no-confidence had been passed, for the issue of a writ of *certiorari*, it was contended, that the co-opted members should not have been allowed to vote, that a President of a Panchayat whose election has been declared void by the Election Commissioner should not have voted, and that the co-option of women and schedule caste members under the proviso to section 12 of the Act was invalid

Held, the word member is defined in section 2 (17) of the Act as meaning a member of a panchayat or of a Panchayat Union Council as the case may be, and includes a co-opted member There is nothing in section 153 of the Act (making provision for passing no confidence motion against the Chairman and Vice-Chairman) which restricts the meaning of the word member only to elected members

An interim stay of the operation of the order of the Election Commissioner obtained in a writ petition filed by a President of a Panchayat for quashing the order of the Election Commissioner setting aside his election as member, would imply that the member could function as if the Election Commissioner had not passed any order The effect of the interim order would not mean only restoration of the membership and not of the Presidentship Such member as President would be entitled to vote in the motion of no-confidence

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1 (1968) M L J (Crl) 525 : (1968) 2 S C J. 334 : A I.R 1963 S C 700.

* W P. No 1482 of 1966. 1st December, 1966.

Reading section 12 of the Act and the proviso thereof together the intention of the Legislature is clear in that, if among the members of the Panchayat Union Council, there is no proper representation for women or members of the scheduled castes or scheduled tribes, they could be co-opted so that there are three women and three members of the scheduled castes and scheduled tribes in the council

If the proviso were to be construed as restricting or qualifying the main enactment, the strength of the Council cannot be enlarged than that which is given in the main section that is the Presidents of all Panchayats in the Panchayat Union as provided in section 12 sub-sections (1) (*i*) and (1) (*ii*). This construction would be opposed to the meaning which is clear when the section and the proviso are read together. Such a construction would clearly render the proviso nugatory.

A proviso can either be a restricting or qualifying proviso or it may be a fresh enactment adding to and not merely qualifying what goes before it In construing a section the entire section including the proviso should be read as a whole

Petition under Article 226 of the Constitution of India, praying that in the circumstancs stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the Rishivandyam Panchayat Union Council relating to the proceedings of the Council at the meeting convened by the first respondent on 5th May, 1966 and quash the same.

V. V. Raghavan, for Petitioner.

T Selvaraj, for Government Pleader (*G. Ramanujam* and *P R Gokulakrishnan*), for Respondents.

The Court made the following

ORDER —This petition is filed by the Chairman of the Panchayat Union Council, Rishivandyam, against whom a motion of no-confidence had been passed for the issue of a writ of *certiorari* calling for the records of the Rishivandyam Panchayat Union Council relating to the proceedings of the Council at the meeting convened by the Revenue Divisional Officer, Vridhachalam, on 5th May, 1966, and for quashing the same as illegal

The petitioner was elected as the Chairman of the Rishivandyam Panchayat Union Council in 1961 On 30th April, 1965, he was re-elected as Chairman On 24th March, 1966, 29 members of the Rishivandyam Panchayat Union Council gave notice to the first respondent, the Revenue Divisional Officer, Vridhachalam, expressing their intention to make a motion of no-confidence in the Chairman of the Council, the present petitioner. A copy of the statement of charges along with the motion was sent to the Chairman by the Revenue Divisional Officer, Vridhachalam, on 31st March, 1966, and the petitioner was required to give a satatement in reply The petitioner furnished the statement on 11th April, 1966 Notices for convening a special meeting on 5th May, 1966, at 11 A M at the Panchayat Union Office for the consideration of the motion against the Chairman, the petitioner, were served on 51 members On 5th May, 1966 at 11 A M the meeting was held The no-confidence motion was put to vote and out of the 39 members present 35 members voted infavour of the motion and two members voted against the motion and one member remained neutral.

The proceedings of the meeting, which passed the motion of no-confidence, are attacked as illegal and void In this petition Mr. V V Raghavan, the learned Counsel for the petitioner, submitted that of the 35 members, who voted in favour of the motion 4 persons were co-opted members and as such they should not have been allowed to vote If their votes had been excluded, it is submitted that there were only 31 votes, which was less than two-thirds of the strength of the Panchayat Council, which is 48. It is alleged that the President of Mandakapadi Panchayat illegally participated in the election, as his election as member of the Mandakapadi Panchayat was declared void by the Election Commissioner The fact that he had filed a writ petition and obtained stay of the order of the Election Commissioner would not

enable him to vote in favour of the resolution of no-confidence Thirdly, it was contended that the proviso to section 12 of the Panchayats Act (XXXV of 1958) should be construed as only qualifying or restricting the main section and, therefore, could not have the effect of enlarging the scope of the main section and when so construed the proviso, which enables the co-option of women and scheduled caste members, would be invalid

The submission that a co-opted member is not entitled to vote is without substance, as the word *member* is defined in section 2 (17) of the Act as meaning a member of a panchayat or of a panchayat union council as the case may be, and includes a co-opted member Section 153 provides that a motion expressing want of confidence in the chairman or vice-chairman of a panchayat union council may be made by giving written notice of intention to make the motion signed by members of the panchayat union council. Apart from the definition which clearly includes co-opted members, there is nothing in section 153 which restricts the meaning of the word *member* only to elected members This contention will have to be rejected

Equally untenable is the contention that the president of the Mandakapadi Panchayat should not have been allowed to vote. Though his election as member was set aside, he filed writ petition to this Court, which gave interim stay of the operation of the order of the Election Commissioner, which would imply that the member could function as if the Election Commissioner had not passed any order It was contended that the effect of the interim order was only to restore the membership of the panchayat and this could not restore his presidentship, which would entitle him to vote in the motion of no-confidence In support of this contention learned Counsel for the petitioner relied on a decision of this Court in *Devasigamony* v. *Sethuratna Iyer*[1], where it was held that the effect of restoration under section 56 (4) of the Madras Local Boards Act, 1920 was not as if the member never lost his office and that hence, where a member of a taluk board, who was also the president of the board lost his membership and consequently his presidentship and was restored to the membership, the restoration did not confer the presidentship also on him This decision will not have any application, as the president of Mandakapadi Panchayat did not lose his presidentship by virtue of the order of the Election Commissioner The effect of the stay order of the High Court was that the member would be in the same position in which he would have been but for the order of the Election Commissioner It is not the case of the petitioner that after the order of the Election Commissioner the president of Mandakapadi Panchayat was removed from office

The next contention of the learned Counsel for the petitioner is more important and involves the construction of section 12 of the Madras Panchayats Act Sub-section (1) and proviso to section 12 as amended by Act XVIII of 1964, with which we are concerned, may be extracted.

> "(1) A panchayat union council constituted for any panchayat union shall consist of—
>
> (*i*) the presidents of all panchayats in the panchayat union ; and
>
> (*ii*) One non-official member of each township committee in the panchayat union chosen in the prescribed manner.
>
> Provided that if among the members of a panchayat union council, there are no women or members of the Scheduled Castes or Scheduled Tribes or the number whether of woman or of the members of the Scheduled Castes or Scheduled Tribes is less than three, the panchayat union council may co-opt such member of women or members of the Scheduled Castes or Scheduled Tribes as may be necessary to ensure that the Council includes three women and three members of the Scheduled Castes and Scheduled Tribes"

Reading the section and the proviso together the intention of the Legislature is clear in that, if among the members of the panchayat union council, there is no proper

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1. A.I.R. 1925 Mad. 1034.

representation for women or members of the scheduled castes or scheduled tribes, such number of woman or members of the Scheduled caste or scheduled tribes would be co-opted so that there are three women and three members of the scheduled castes and scheduled tribes in the Council. Mr. V.V. Raghavan, learned Counsel for the petitioner submitted that the proviso should be construed according to the rules of construction to except out of the preceding portion of the enactment or to qualify something enacted therein, which but for the proviso would be within it. In other words the contention is that the proviso cannot be construed as enlarging the scope of the enactment. If so construed, the strength of the council cannot be enlarged than that which is given in the main section, that is the presidents of all panchayats in the panchayat union and one non-official member of each township committee in the panchayat union as provided in section 12, sub-sections (1) (*i*) and (1) (*ii*). This construction if accepted, would be opposed to the meaning which is clear when the section and the proviso are read together. Such a construction would clearly render the proviso nugatory. In construing a section the entire section including the proviso shoud be read as a whole. Maxwell on 'Interpretation of Statutes, Eleventh Edition, at page 155, has stated the rule thus:

> "There is no rule that the first or enacting part is to be construed without reference to the proviso. " The proper course is to apply the broad general rule of construction, which is that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest."
>
> "The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together is to prevail."

If this rule is observed, there is no difficulty at all in construing the section and the meaning is very clear. In support of the contention that the proviso should only be read as restricting or qualifying the main eanactment, learned Counsel for the petitioner relied on certain authorities which may now be referred to. In Halsbury's Laws of England (Third Edition, Volume XXXVI) at page 399 it is stated:

> " A proviso *prima facie* excepts out of a previous enacting part of a statute something which but for the proviso would have been within the enacting part...... Therefore where an enactment is ambiguous, a proviso to it may be a useful guide to its meaning; but where the meaning of an enactment is clear and unambiguous, it should not be construed as modified by any implication derived from a proviso which is a mere qualification of or exception from it.

To the same effect is the passage in Craies on Statute Law, Sixth Edition, where the learned author has stated the rule at page 217 thus:

> "The effect of an excepting or qualifying proviso according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it; and such a proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect

While stating this general principle it has to be seen that Halsbury's Laws of England (Third Edition, Volume XXXVI) at page 400 has qualified the principle:

> " The substance, and not the form, must, however, be looked at, and that which is in form a proviso may in substance be a fresh enactment, adding to and not merely qualifying that which goes before "

This statement is made on the authority of the decision in *Rhondda Urban Council* v. *Taff Vale Railway*[1], where Lord Loreburn, L.C., in construing section 51 of the Railway Clauses Act, 1845 observed at page 258:

> " It is true that section 51 is framed as a proviso upon preceding sections. But it is also true that the latter half of it, though in form a proviso, is in substance a

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1. L.R. (1909) A.C. 253.

fresh enactment, adding to and not merely qualifying that which goes before. So the question really turns upon section 51 itself. It must be read in the light of what goes before and with a close regard to the purpose of the group of sections, to which it belongs..... ... ..

Craies on Statute Law, Sixth Edition, refers to this decision at page 218 and observes:

" But sections, though framed as provisos upon preceding sections, may exceptionally contain matter which is in substance a fresh enactment adding to and not merely qualifying what goes before."

The question, therefore, is whether a particular proviso is an excepting or qualifying proviso or one which is in substance a fresh enactment adding to and not qualifying what goes before it As for the proviso with which we are concerned, there can be no difficulty in coming to the conclusion that it belongs to the latter class, which is a fresh enactment having the effect of adding to the section If construed in any other manner, the entire section will lose all its meaning and the proviso will become nugatory. Reliance was placed on a decision of the Supreme Court in *I T. Commissioner* v *I M. Bank, Ltd* [1], The Supreme Court was considering section 32 (1) of the Travancore Income-tax Act and the proviso to it which are as follows

" Where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in section 9 (section 6) he shall be entitled to have the amount of loss set off against this income, profits or gains under any other head in that year :

Provided that where the loss sustained is a loss of profits or gains which would but for the loss have accrued or arisen within British India or in an Indian State and would under the provisions of clause (*c*) of sub-section (2) of section 18 (section 14 (2) (*c*)), have been exempted from tax, such loss shall not be set off except against profits or gains accruing or arising within British India or in an Indian State and exempt from tax under the said provisions "

The Court after referring to the rule laid down in *Rhondda Urban Council* v *Taff Vale Railway*[2], that a proviso may in substance be a fresh enactment, adding to and not merely qulifying that which goes before it proceeded to consider whether the proviso to section 32 (1) fell under the rule laid down in that case, or whether the proviso would be a qualifying and restricting proviso The Court held that it was a restricting proviso. The decision of the Supreme Court lays down that a proviso can either be a restricting or qualifying proviso or that it may be a fresh enactment adding to and not merely qualifying that goes before it. The decision cannot, therefore, help the learned Counsel for the petitioner.

In *Abdul Jabar* v *State of J. & K.*[3], it is stated :

" In the first place it is a fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso Therefore, the priviso in question has to be construed harmoniously with the provision......... .... "

In *Kedarnath J. M Co* v *C. T Officer*[4], Subba Rao, J (as he then was) approved the rule in Craies on Statute Law, Sixth Edition, at page 217, extracted above Reliance was placed on a decision of a Bench of this Court in *Ramkishan* v. *Commissioner of Commercial Taxes*[5], where in construing sub-section (2) of section 41 of the Madras General Sales Tax Act, it was held that the proviso to the section could not expand, enlarge or amplify the scope and ambit of the main provision. Section 41, sub-section (2) provided that the books of the business would be open to inspection at all reasonable times The proviso enabled the officer to search under certain circum-

1. (1959) S C J 655 A I R. 1959 S C 713
2. L.R. (1909) A C 253.
3. (1957) S.C J 184 . (1957) M L J (Crl) 83 A I.R 1957 S C 281 at 284.
4. (1965) 2 S C.J. 890 (1965) 3 S C R. 626 . A.I.R. 1966 S C. 12.
5. (1965) 2 I T J. 178 : I.L.R (1966) 1 Mad 267

stances. It was held that the power of search could not be conferred by means of a proviso It was not contended before the Bench that the proviso would be a fresh enactment adding to what was stated before. The decision cannot be construed as ruling out the possibility of a proviso being a fresh enactment adding to what was stated before in the section.

In the result all the contentions raised by the learned Counsel for the petitioner fail and the writ petition is dismissed with costs of the fourth respondent.

V.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE T. RAMAPRASADA RAO.

State of Madras, By Deputy Commissioner of Commercial Taxes, Madras Division .. *Petitioner**

v

M. Rangarajan .. *Respondent.*

Madras General Sales Tax Act (I of 1959), sections 12(3), 15 and 25—Assessment proceedings taken against assessee and completed against legal representative—Levy of penalty against legal representative—Legal.

The assessment proceedings were taken against the assessee and completed after his death against his son as a legal representative In addition to the tax levied, a penalty also was imposed under section 12 (3) of the Act The Tribunal in appeal held that the penalty levied against the legal representative was without authority. In the revision to the High Court,

Held, the penalty under section 12 (3) of the Act of 1959 can be levied on the legal representative of the deceased assessee.

The first part of section 15 clearly enables the Department to levy penalty on the deemed dealer who is the legal representative of the deceased, under section 12 (3) The second part of the section no doubt does not refer to penalty But for purposes of collection of tax, section 25 says that any penalty payable under the Act shall be deemed to be tax thereunder for that purpose. Section 15, therefore provides both for levy of penalty under section 12 (3) and also recovery thereof, the only limitation being that the recovery should be confined to the assets of the deceased in the hands of the legal representative.

Petition under section 38 of the Madras General Sales Tax Act, 1959 praying the High Court to revise the order of the Sales Tax Appellate Tribunal, Madras, dated 12th June, 1963, and made in T A No. 449 of 1962 (Appeal No 163/61-62 (T.J R.), dated 8th February, 1962 (Commercial Taxes), Thanjavur for the assessment year 1959-60 against A 1. 5578/59-60, dated 31st March, 1961, on the file of the Deputy Commercial Tax Officer, Mannargudi).

K Venkataswami, for Additional Government Pleader (*V. Ramaswami*), for Petitioner.

R. S. Venkatachari, for Respondent.

The Order of the Court was delivered by

Veeraswami, J.—A short point, but one of importance, arises in this case, to wit, whether penalty under section 12 (3) of the Madras General Sales Tax Act I of 1959 can be levied on the legal representative of the deceased The Tribunal has taken the view that it is not permissible. One Muthukrishnan Naidu died on 30th October, 1960. He was the proprietor of a rice mill at Pullamangalam. There

* T.C. No. 79 of 1964. 28th March, 1967.

was a surprise inspection of his premises on 9th December, 1960 as a result of which certain *anamath* books were seized which led to a discovery of large amount of turnover which he had failed to return. This was brought to tax. We are not concerned with this aspect. After the assessment proceedings were taken and completed after his death, and against his son as his legal representative, in addition to the tax levied a penalty of Rs 1,130 also was imposed under section 12 (3) which was reduced to Rs 610 on appeal Before the Tribunal on appeal by the legal representative, it was contended for him that the 1959 Act did not authorise the levy of penalty. The Tribunal was of the view that levy of penalty is of a quasi-criminal nature and took into account decisions rendered under section 24-B of the Income-tax Act, 1922. It also considered that section 15 itself was silent as to penalty It, therefore, concluded that the penalty levied was without authority.

We are unable to accept the Tribunal's view Granting that levy of penalty is of a quas -criminal character, which we do not decide, if the terms of a statute authorise it, there can then be no objection apart from any constitutional question, which is not raised before us The scheme of section 24-B of the Income-tax Act, 1922 is totally different from section 15 of the Madras General Sales Tax Act, 1959. Section 15 directs that when a dealer dies, his legal representative shall be deemed to be a dealer for the purposes of the Act. In view of this deeming provision, one cannot boggle with one's imagination and notwithstanding the deeming, revert to putative state of affair and imagine an assessment on a legal representative as such. For purposes of the Act, a legal representative of a deceased should be taken as a dealer and it will be so for purposes of section 12 (3) All the provisions of the Act will apply to the deemed dealer in respect of the business of the deceased dealer. Section 15 further provides that in respect of any tax or fee assessed as payable by such dealer or any tax or fee which would have been payable by him under the Act, if he had not died, the executor, administrator or other legal representative shall be liable to the extent of the assets of the deceased in his hands. The first part of section 15 clearly enables the Department to levy penalty on the deemed dealer, who is the legal representative of the deceased, under section 12 (3). The second part of the section no doubt does not refer to penalty. But for purposes of collection of tax, section 25 says that any penalty payable under the Act shall be deemed to be tax, thereunder for that purpose. Section 15, therefore provides both for levy of penalty under section 12 (3) and also recovery thereof, the only limitation being that the recovery should be confined to the assets of the deceased in the hands of the legal representative

This construction we have placed upon sections 15 and 25 of the Madras General Sales Tax Act, 1959 is supported by the fact that section 159 (3) of the Income-tax Act, 1961 clearly provides, unlike section 24-B of the Income-tax Act, 1922, that the legal representative of the deceased shall for the purposes of the Act be deemed to be an assessee The deeming is complete and the legal representative is regarded as the dealer for the entire range and purpose of the Act

On that view, the order of the Tribunal is set aside and that of the Appellate Assistant Commissioner is restored.

V S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

Vanamamalai Thevar and others ... *Appellants**

v.

Narayana Pillai ... *Respondent.*

Civil Procedure Code (V of 1908), Order 22, rule 3—Death of sole plaintiff—Deed of settlement conferring a life interest on the plaintiff—Suit to recover possession from alienee defendants and future profits—Son of plaintiff impleaded as defendant—Status of son questioned by defendants—Issue kept open—Dismissal of suit and pendency of appeal—Death of plaintiff—Transposition of son as legal representative and not as remainderman under the deed—No objection by defendants—Decree for possession and future profits, if can be passed—Practice.

The plaintiff who claimed that the suit properties were settled under a deed on herself and her husband for their life time to be enjoyed jointly, sued the alienee defendants for recovery of possession, impleading in the suit, her son also. The trial Court dismissed the suit. The plaintiff filed an appeal but died pending the appeal. In the appeal, her son who was the second respondent was transposed as the appellant as the legal representative of the plaintiff. His legitimacy was questioned in the suit but the issue was left open by all the parties but no objection was raised to his being impleaded as the legal representative of the deceased plaintiff-appellant. The appellate Court allowed the appeal and granted a decree for possession and directed the ascertainment of mesne profits separately. The alienees appealed.

Held, there can only be a declaration that the plaintiff had title and right to the possession of the suit properties for her life under the deed of settlement. The decree of the appellate Court granting possession and providing for ascertainment of future mesne profits will be set aside.

As the cause of action does not survive to the heir of the deceased plaintiff, the relief of possession cannot be maintained by the legal representative. The substantial relief claimed in the suit is assertion of the title to possession only, till death. With the death it is extinguished and does not survive to her legal representative. The claim for future profits made in the plaint is not on any independent cause of action. Where the action cannot be maintained for possession it could not be continued as a claim for future mesne profits.

The remedy of the legal representative as the remainderman under the deed of settlement is to sue on his title. The time taken in these proceedings would be excluded under section 14 of the Limitation Act.

Case-law discussed.

Appeal against the decree of the Sub-Court, Tirunelveli, in A.S. No. 100 of 1962 preferred against the decree of the District Munsif of Tirunelveli, in O.S. No. 24 of 1961.

R. Rajagopala Ayyar, for Appellants.

V. Ratnam, for Respondent.

The Court delivered the following

JUDGMENT.—This Second Appeal has been filed by defendants 1, 3 and 4 and arises out of a suit for recovery of possession of the plaint schedule properties with future mesne profits from the date of suit. Defendants 3 and 4 are wife and son of the first defendant and have been added subsequent to the institution of the suit, the fourth defendant being a minor represented by his mother as guardian *ad litem*. The plaintiff Sivagami Ammal was the wife of one Arunachalam Pillai, to whom the suit properties admittedly belonged. The 2nd defendant in the suit was impleaded

* S.A. No. 445 of 1963. 29th April, 1967.

as the *santhathi* or son of the plaintiff and the said Arunachalam Pillai It was the plaintiff's case that Arunachalam Pillai who was leading a wayward life and dissipating his properties, at the request of the plaintiff and others interested in the couple, executed a settlement deed on 31st March, 1925, whereunder the suit properties were settled on hereself and her husband for their lifetime to be enjoyed jointly The properties have to pass on to their issues on the death of the survivor of them The settlement deed generally prohibits alienations by the husband and wife, alienation being permitted, if necessary only by both the husband and wife jointly. The settlement is evidenced by the registration copy, Exhibit A-2 Defendants 1, 3 and 4 were impleaded as alienees from the husband, the alienations having been made in contravention of the terms of the settlement deed Arunachalam Pillai, the plaintiff's husband, died on 9th February, 1957 Alleging that the first defendant was interfering with the plaintiff's enjoyment of the suit properties on the strength of the alienations made by the deceased Arunachalam Pillai, the suit was instituted on 2nd January, 1961 The plaintiff averred that the transfers by the deceased were not binding on her and that she became entitled to the exclusive possession of the suit properties for her life on the death of her husband, her son, the 2nd defendant, to succeed to the properties as the vested remainderman after her. In defence *inter alia* defendants 1, 3 and 4 contended that the settlement deed was a sham and nominal transaction executed with the sole object of screening the properties from creditors and it was never intended to take effect. These defendants pleaded that shortly after the settlement, the plaintiff eloped with one Sangu Thevar, the power-of-attorney agent of the plaintiff in the present Court proceedings, and that thereupon Arunachalam Pillai on 29th April, 1925, by a registered deed duly cancelled the original settlement he had duly made The deed of cancellation is evidenced by Exhibit B-1. It was further pleaded in defence that Arunachala Pillai himself continued in possession of the properties in his own right and that possession had passed from him to his transferees on transfer and that thus, the plaintiff's claim was barred by adverse possession There was a plea that some of the suit properties were not in their possession and that they had no interest whatsoever in those particular items There was also a plea that the third defendant was not a necessary party to the action, as her interest and right in a half share in items 13 and 16 of the suit properties was derived from Murugayya, the elder brother's son of the deceased Arunachala Pillai to whom that share had been allotted in their family partition These defendants further plead that the 2nd defendant was not the son of Arunachalam Pillai as long before his birth the plaintiff had deserted Arunachalam Pillai and that the 2nd defendant was not a *santhathi* of Arunachalam Pillai and the plaintiff. It was therefore said that the second defendant was an unnecessary party to the suit. The trial Court found for the contesting defendants and held that the settlement deed was only a sham and nominal transaction, which was not given effect to by Arunachalam Pillai and that plaintiff had at no time any enjoyment of the suit property. The issue as to the legitimacy of the second defendant was left open, it being remarked that the learned Counsel for the first defendant had conceded that the question need not be gone into in the suit The 2nd defendant, in the circumstances, was deemed to be an unnecessary party to the suit by the trial Court The title and right to possession of the contesting defendants being found, the plaintiff's suit was dismissed with costs.

The plaintiff preferred the Appeal A S. No. 100 of 1962, from this decision reiterating her claims and contentions. Pending the appeal the plaintiff, Sivagami Ammal died on 15th February, 1962, intestate leaving her surviving as her only issue and son, the 2nd defendant in the suit. The 2nd defendant had been impleaded in the appeal as the second respondent and by I A No 85 of 1962 he applied to be transposed as the second appellant in the appeal in his character as the legal representative of the deceased Sivagami Ammal that he may proceed with and prosecute the appeal further In the affidavit in support of the application, it was stated that the right to sue and the right to carry on the appeal survived in him as the only heir of the deceased Sivagami Ammal and that he was therefore, entitled to be transposed as the second appellant and legal representative of the deceased. There was no

objection to the 2nd defendant—2nd respondent in the appeal being transposed as the second appellant for the purpose of further prosecution of the appeal. In the counter-affidavit filed, it was specifically stated that the respondents (the contesting defendants in the suit) had no objection to have the second defendant regarded as the legal representative of the deceased, as the son of his mother, Sivagami Ammal. Only they did not admit that he was the son of Arunachalam Pillai. They questioned this claim that Arunachalam Pillai was his father. The contesting respondents in the appeal were not only willing but had no objection to the appeal being further prosecuted by the 2nd defendant in the suit as the legal representative of the deceased plaintiff. The application was therefore ordered and the appeal was continued with the son of Sivagami Ammal as the 2nd appellant. No question was raised at any stage of the proceedings in the lower appellate Court that the cause of action did not survive to the son of the deceased. The averment in the affidavit of the 2nd defendant that the cause of action survived to him and that he could further prosecute the appeal was not traversed. In the circumstances when the appeal was taken up for hearing, the question that the learned Subordinate Judge posed before himself for consideration was, whether the settlement deed had taken effect and if so, whether its cancellation was binding on the plaintiff. On his review of the oral and documentary evidence and on a consideration of the probabilities and the circumstances of the case and rejecting the story of elopement pleaded by the respondents as totally false and unacceptable, he concluded that the settlement was not a sham transaction. He held that the unilateral cancellation of it by the settlor was not valid and would not bind the donee. The very terms of the settlement deed were opposed to the contention that the settlement was a sham transaction. Some five years after the settlement deed, *othi* had been executed by the husband and wife jointly and according to the learned Subordinate Judge, this established that the settlement deed had been given effect to and followed by Arunachalam Pillai. The subsequent transaction further established according to the learned Subordinate Judge, that the cancellation deed was not given effect to and had not taken effect. The finding as to the reality of the settlement is a pure question of fact in the circumstances of this case, and nothing has been made out for upsetting the finding. The learned Subordinate Judge also examined the plea of adverse possession put forward for the contesting defendants and found against the plea. Alienations in favour of defendants 1, 3 and 4 were all within 12 years prior to suit and according to the learned Subordinate Judge it had not been established that the possession of Arunachalam Pillai prior to the alienation was adverse to his tenant-in-common, that is the plaintiff. Under the settlement, the husband and wife were tenants-in-common, of the settled properties. Exhibit B-1 the cancellation deed, according to the learned Subordinate Judge, whereunder the husband purported to revoke the settlement, had not been given effect to. Subsequent to the settlement deed about five years after, the husband and wife had joined together and executed othis of the settlement properties. Reliance was placed before me on behalf of the contesting defendants on Exhibit B-5 and B-25 for making out the case of adverse possession of the properties by Arunachalam Pillai. Under Exhibit 5 there was no transferance of possession by Arunachalam Pillai. The document is a further mortgage and refers to the earlier possessory mortgage, Exhibit B-4, dated 13th August, 1930, jointly executed by the plaintiff Arunachalam Pillai. The mortgagee had entered into possession of the property under Exhibit B-4 from both the tenants-in-common and his lawful possession cannot become adverse by his merely taking a subsequent possessory mortgage of the same property from one of the tenants-in-common, purporting to be the exclusive owner of the properties. Rightly, no weight has been given to this document by the lower appellate Court as in any way making out the defendants' case of adverse possession of Arunachalam Pillai against his wife. The document Exhibit 25 too has no relevance on the question of adverse possession. It is a registration copy of the will executed by the plaintiff's own father of his properties. There, the father refers the fact of his daughter living separately from her husband, as a reason for his making provisions for her by the will. It certainly is not any evidence that

Arunachalam Pillai was holding the properties in the year 1938 adverse to his wife. He was a tenant-in-common with her and had in 1930 joined with her in executing *othi* of the properties, thereby recognising the joint rights of both in the properties. The finding as to the adverse possession given by the lower appellate Court cannot therefore be impugned in this Court within the limits of a Second Appeal There was ample and substantial material for the learned Subordinate Judge to arrive at the conclusion as he has done and the strenuous arguments of Mr R Rajagopala Aiyar, learned Counsel for the appellants before me, do not make out that these findings of fact are in any way vitiated and open for reconsideration in Second Appeal.

The learned Subordinate Judge even as the trial Court did, left the question of the legitimacy of the 2nd defendant open in the trial Court; he observed that the question of the 2nd defendant's legitimacy was not relevant for the purpose of the suit. Neither of the parties had claimed an adjudication on this question In result on the finding that the settlement had taken effect and that there had been no valid cancellation of it, the learned Subordinate Judge set aside the decree of the trial Court and decreed the suit for possession of the plaint schedule properties. As the learned Subordinate Judge had accepted the case of the third defendant of her claim to a half share of items 15 and 16, her share in those items was exonerated from the suit. He directed mesne profits in respect of the properties decreed, to be ascertained by separate proceedings under Order 20, rule 12, Civil Procedure Code.

Apart from the merits of the case, which I have discussed already, a further point is raised before me, the competency of the lower appellate Court to grant a decree for possession in favour of the second defendant as the legal representative of the plaintiff, after the death of the plaintiff. It is most unfortunate that this aspect of the matter was completely lost sight of and ignored by the lower Court. Under the settlement deed, the plaintiff held only a life estate and the remainder went to the lawful issue of the settlor and his wife The 2nd defendant was impleaded in the suit as a party defendant on the averment that he is the son of the settlor. This was questioned and both the Courts below have left the question open whether the second defendant is the *santhathi* of the settlor and his wife the plaintiff in this case. The settlor died in 1957 On his death under the terms of the settlement deed, the possession would continue in his wife, the plaintiff, for her life and after her, the issue gets the properties If the second defendant is the issue of Arunachala Pillai and his wife, he would in his character as the *santhathi* be entitled to the suit properties; but the second defendant had been transposed in the appeal only as the legal representative of the plaintiff and not as the *santhathi* of Arunachalam Pillai. As the legal representative of the plaintiff, Sivagami Ammal, he would be entitled to whatever estate she had in the property, that pass on her death to her heir. But her possession of the suit properties was only for her life and on her death her interest therein ended and could not pass on to her heirs. Clearly, the cause of action, for the claim for possession of the suit properties under the settlement did not survive to her heirs. The second defendant has come on record only as her heir The trial Court held that he was an unnecessary party His status as *santhathi* was not adjudicated upon and both the Courts have considered any adjudication of that question unnecessary. No heir of the plaintiff as such can claim to be brought on record to continue the suit for possession and take a decree for possession. The claim for possession manifestly abated with the death of the plaintiff; the position is incontestable Surprisingly, this point was not taken in the lower Court. It is difficult to imgaine why it was missed and whether the attitude of the defendants then was deliberate, the defendants evidently not willing to give up the findings in their favour about the invalidity of the settlement deed and hoping to have the findings confirmed in their favour in the appeal, in the presence of the second defendant. Otherwise, I cannot understand the attitude adopted by the defendants Cautiously in the counter affidavit, they denied only the status of the second defendant as the son of Arunachalam Pillai They conceded that he was the legal representative of the plaintiff and that he may be brought on record. As observed by me, when setting out the facts of the case, there was no traverse by the

defendants of the allegation by the 2nd defendant in his application to come on record, that the cause of action survived to him as the legal representative of the plaintiff.

It is one thing to hold that the 2nd defendant in his character as the legal representative of the plaintiff cannot claim possession, but the question for consideration is, whether the 2nd defendant, who had as legal representative, secured a decree for possession as well as *pendente lite* profits, is to be non-suited completely at this stage Learned Counsel for the second defendant referred me to the decision in *Ramiah* v *Adikesavalu*[1]. In that case, the widow was entitled to possession during her lifetime Under a will on her death the testator's sister's son was entitled to the possession Pending the suit, the widow died and the sister's son, who had a vested remainder, applied to bring himself on record as the legal representative of the deceased widow The learned Judge held that the widow had instituted a suit in the representative character and the right to sue had survived to the remainderman and that the sister's son was therefore entitled to be brought on record under Order 22, rule 3, Civil Procedure Code, and continue the suit The learned Judge observed:

"In order therefore to entitle a person to bring himself on record as the legal representative or as a co-plaintiff to continue the suit, what he has primarily to establish is that the right to sue has survived to him, even though he may not be strictly the legal representative in the sense that he represents the estate of the deceased person. In this case, however, as the suit has been held to be instituted in a representative character as one not alone on behalf of the widow but even on behalf of the remainderman the respondent, and the right to sue has also survived to the respondent, the order of the learned District Judge bringing the respondent on record under the provisions of Order 22, rule 3, Civil Procedure Code, is correct."

In the present case, the 2nd defendant had not come on record as the remainder man. Specifically, he has been brought on record only as the legal representative of the widow. The second defendant applied to bring himself on record not on the basis that the plaintiff was litigating in respect of the estate covered by the settlement, but as her personal representative. The decree as passed by the appellate Court gives possession to the second defendant only as the legal representative of the deceased-plaintiff. Clearly no legal representative of the deceased plaintiff would be entitled to possession under the title upheld in the suit This case in the circumstances, does not help the second defendant On the averments in the plaint, it would have been possible for the second defendant to have contended that the suit had been laid by the widow in her representative capacity. He did not choose to do so; the contesting defendants readily conceded his right to come on record and continue the proceedings as the heir of the plaintiff

Learned Counsel for the second defendant contends that at any rate as representing the estate of the deceased, the second defendant could sustain the suit to the extent of the decree for mesne profits Learned Counsel contends that there was a decree for mesne profits from the date of suit to be ascertained under Order 20, rule 12. The suit had been instituted on 2nd January, 1961, and the plaintiff died on 15th June, 1962. Learned Counsel contends that for the period there can be a decree for mesne profits and even though a decree for possession may not be tenable on the death of the widow, the claim for mesne profits is an independent cause of action and the decree of the lower appellate Court would be sustained to that extent. This is met by Mr. R Rajagopala Iyer by the plea that there could be no decree for mesne profits simpliciter in this case without a decree for possession and if no decree for possession could be passed, there should be no decree for mesne profits.

There can be no doubt that the heir of the deceased plaintiff, who may not be the remainderman under the settlement, would be entitled to the mesne profits which the plaintiff could have claimed. The claim for profits would go with her estate and

1. (1953) 2 M L J. 88 A I R. 1953 Mad 869.

does not die with the claim for possession She had been kept out of possession of the properties during her lifetime and the loss to her estate represents the claim for mesne profits What the defendants in wrongful possession received or might, with ordinary diligence, have received ought to go to enrich her estate Her claim for possession and mesne profits may arise out of the same transaction; but as far as the decisions of this Court go, the cause of action for the two are different The suit for possession and the suit for mesne profits are based on distinct causes of action There could be a suit for possession and mesne profits accrued till date of suit and a subsequent suit for the mesne profits accruing after the filing of the suit. (See *Doraiswami* v *Subramania*[1], Claim for mesne profits uptil date of suit without possession and a suit for possession could be filed subsequently A plaintiff can file a suit for the mesne profits of the properties from which he has been dispossessed by defendant without being obliged to sue for possession also along with the claim for profits See *Tirupati* v *Narasimha*[2], and *Dyamovee Dayee and others* v. *M Modhoo Soodan Mytee*[3] Counsel for the 2nd defendant contended that as the claim to profits is severable from the claim to possession, and as heir he was entitled to the profits that had accrued as due to the estate, he could sustain the decree for the profits and the findings in the case necessary to sustain the decree for profits Learned Counsel submitted that only his client may not be entitled to possession in his right as the heir of the deceased-plaintiff, but as heir he could continue the suit for the profits that she could have claimed. Reference in this connection is made to the decision of this Court in *Alamelu Ammal* v *Chellammal*[4] In that case a widow of a coparcener in a joint Hindu family, sued for her share in the properties under the Hindu Women's Rights to Property Act XVII of 1937. A preliminary decree for partition and for mesne profits was passed in her favour. During the pendency of the appeal filed by the other members of the joint family the widow adopted a minor boy to her deceased-husband and she died pending the appeal On the question whether the claim of the widow abated and on whom the interests in the property delvolved and whether the adopted son can continue the suit, it was held that the mesne profits that was decreed to the widow would be separate property and the adopted son would be entitled to the same as her heir and legl representative That interest would be sufficient to bring him on record and prevent an abatement of the appeal. But it must be noted that this is a case where a decree had been passed for mesne profits. In *Subbarao* v *Krishna Prasad*[5], a Hindu widow, who filed a suit for partition and for past and future maintenance died pending the suit Her daughter as streedhanam heir sought to come on record in her place. The learned Judges held that the claim for partition and the claim for furture maintenance did not survive to the streedhana heir and to that extent the action abated. However, the claim for past maintenance including therein the claim upto the date of the death of the widow, stood on a different footing. It was conceded in that case that it survived to the streedhana heir The order of the Court below bringing on record the streedhana heir as legal representative it was held could, therefore, be sustained so far as the suit related to the past maintenance But the learned Judges observed that no contention had been raised before them that the proper remedy for the streedhana heir was to file a separate suit to enforce her rights and not to continue the action instituted by her mother The death in that case had taken place pending the suit and while the principal relief applied for was held not to survive, the heir was brought on record to pursue the matter so far as past maintenance that is maintenance till death was concerned. The claim then as stated already included maintenance prior to suit and future maintenance This may make a difference.

The contention of Mr. Rajagopala Iyer is that the principle of these cases would not apply to the case on hand. Here there was no claim for past profits. The plaintiff had claimed partition and future mesne profits There has been no

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1. (1918) 33 M L J. 699 . I L.R 41 Mad 188 269 (F.B)
2. (1888) I L R. 11 Mad 210
3. 3 W.R 147.
4. I L R (1959) Mad. 106 : (1959) 1 M.L.J
5. I L R. (1954) Mad. 267 : (1953) 2 M.L J. 561 : A I.R. 1954 Mad 227

decree for possession or profits by the trial Court. The appellate Court ignoring that there could be no decree for possession, while granting the decree for possession, it has ordered in the decree that future mesne profits shall be determined by separate proceedings under Order 20, rule 12, Civil Procedure Code. Of course these proceedings will be in the suit itself Learned Counsel contends that when the principal or the main relief cannot be had, an incidental relief like profits, *pendente lite* ought not to be decreed There is force in this contention. When the action has to abate in respect of the main or substantial relief if no action could be maintained independently for the incidental relief that is just future profits, it must also fail. While there can be a claim for profits accrued till date of suit without a claim for possession, certainly one cannot conceive of a suit for future profits only. The present action by the plaintiff cannot be deemed to be in respect of two independent reliefs, both available on the date of the suit, a relief for possession and a relief for future profits. There was no claim by the plaintiff for profits accrued due on the date of the suit. Normally the representative of the deceased-plaintiff can only prosecute the cause of action as originally laid. Learned Counsel for the defendants referred to *Kunhi-Kuttiamma* v. *Narayana*[1], where it was held that where the right to recover mesne profits given under a decree is incidental to the main relief for redemption of the mortgaged property, as long as redemption is stayed, no right to recover mesne profits can arise, because the possession can be considered only as that of mortgagees. This decision cannot be of much help to the defendants as in essence what is decided is that till redemption the possession of the mortgagee is not wrongful and there could be no claim for mesne profits. When the possession is wrongful, the right to mesne profits is not merely incidental to the relief of possession. As discussed above, there could be a claim for mesne profits, without making an immediate claim for possession, only the time would be running against the plaintiff for an action for possession. But the bar to a decree for future mesne profits alone rests on a firmer and more formidable ground. A Court can claim no jurisdiction to give plaintiff relief on a cause of action that had not accrued to him on the date of the suit To this principle, Order 20 rule, 12, Civil Procedure Code, makes an exception This rule enables the Court to pass a decree for future mesne profits from the institution of the suit until delivery of possession by the judgment debtor with notice to the decree holder through Court or the expiration of three years from the date of the decree-whichever event first accrues In a suit for recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree, directing an enquiry as to the future profits When an enquiry is directed by the decree, a final decree should be passed by the Court in accordance with the result of the enquiry. The object of this provision is to avoid multiplicity of suits. The provision is in respect of profits *pendente lite*, profits which would go with the relief of possession. It is only when a suit is competent for the recovery of possession of immovable property and for rent or mesne profits of the property, that the Court may pass a decree for future profits. In *Basavayya* v *Guravayya*[2], the position is thus stated:

> " The cause of action for future mesne profits is the plaintiff's being kept out of possession during the suit and arises subsequent to the suit. In empowering Courts to award future mesne profits, Order 20, rule 12, Civil Procedure Code, makes an exception to the general rule that a plaintiff can only sue on such cause of action as has arisen on the date of instituting his suit The object is to avoid the multiplicity of litigation that would result if persons, unlawfully kept out of possession of their lands were obliged to file suits every three years for mesne profits accruing after the institution of a suit in ejectment and during its pendency in the original and appellate Courts. But the plaintiff could not claim future mesne profits as a matter of right, the cause of action for such profits not having arisen to him at the date of the suit "

It is pointed out by the Full Bench that future mesne profits, which are granted at the discretion of the Court, could well be awarded as part of the general relief to

1. A.I.R. 1952 T.C. 517.
2 I.L.R. (1952) Mad 173 : (1951) 2 M L.J 176 A I R. 1951 Mad 938 (F.B.).

which a plaintiff is entitled even, if there was no specific prayer in the plaint for the recovery of such profits. This view has been recently affirmed by the Supreme Court in *Gopalakrishna Pillai* v. *Meenakshi Ayal*[1]. Their Lordships observed thus:

> " With regard to past mesne profits, the plaintiff has no existing cause of action on the date of the institution of the suit .. .. .with regard to future mesne profits the plaintiff has no cause of action on the date of the institution of the suit, and it is not possible for him to plead this cause of action or to value it or to pay Court-fees thereon at the time of the institution of the suit. Moreover he can obtain relief in respect of this future cause of action only in a suit to which the the provisions of Order 20, rule 12 apply. But in a suit to which the provisions of Order 20, rule 12 apply, the Court has discretionary power to pass a decree directing an enquiry into the future mesne profits and the Court may grant this general relief though it is not specifically asked for in the plaint............."

No doubt in *Muslim Bank* v *Hasan Shriraza*[2], a decree for rent *pendente lite* was granted while granting the relief for ejectment The learned Judges observed thus·

> " No doubt where a plaintiff's suit for possesion of property is dismissed by reason of want of title in the plaintiff to the suit property, the claim for rent *pendente lite* also would not be decreed because a person who has no title to the property cannot claim compensation for usage and occupation of the property. But where plaintiff's title to the property is not questioned and the Court is unable to grant the relief for ejectment by reason of the jurisdiction to grant of the same having been vested in another authority by special law his claim to rent *pendente lite* cannot be affected and he could he given a decree "

The suit itself was filed for ejectment and for rents due upto the date of the suit The claim for ejectment could not be decreed, as the plaintiff had to appear before the Rent Controller and obtain his permission The Rent Controller had rejected permission This case is clearly distinguishable The title of the plaintiff was not in dispute. It could not be said that the suit was not properly laid for possession and rents Only the relief for possession could not be availed of *Kalidas* v *Satyeshchandra*[3], is again a case where mesne profits *pendente lite* were granted when no decree for possession could be granted In that case the suit was properly laid by the plaintiffs for recovery of possession of a patni taluq on a declraticn of the plaintiff's title thereto and after annulment of encumbrances, if any, and also for mesne profits During the pendency of the suit, the patni of the plaintiffs defaulted in payment of its rents and in consequence thereof, it was sold under the patni regulation and purchased by defendant 17 In the circumstances, the trial Court declared the plaintiff's title to the patni upto the date of sale, and holding that the plaintiffs were not entitled to get possession as they had no subsisting interest on the date of the decision, they were given a decree for mesne profits upto the date of the suit as claimed and from the date of the suit till the date of sale against the persons, who were deemed trespassers. Upholding this decree, it was said in appeal—

> "As regards this matter, it has been argued in the first instance, that a decree for mesne profits can only follow a decree for possession, and that when the plaintiffs have failed to obtain a decree for possession their claim for mesne profits should not have been allowed. The proposition which the appellant has thus propounded and which under ordinary circumstances is perfectly sound, cannot be regarded to be applicable to the present case in its special circumstances It is only because of the sale that took place during the pendency of the suit that the plaintiffs are precluded from obtaining his possession. This cannot deprive the plaintiffs of their right to mesne profits upto the date upto which they were entitled to possession."

The two cases above cited are not cases of abatement of the action itself and are distinguishable from the present case

1. (1967) 1 M L J. (S C) 89 : (1967) 1 An. W.R. (S.C) 89 . (1967) 1 S C J. 450 : A I.R. 1967 S.C. 155.
2. A I.R 1951 Hyd. 57.
3. A.I R 1933 Cal 554.

We have here a case where the cause of action does not survive to the heir of the deceased plaintiff The matter for possession cannot be maintained by him. The title of the original plaintiff to possession is till her death. The substantial relief claimed in the suit is assertion of that title With her death it is extinguished and does not survive to her legal representative The claim for future profits made in the plaint is not on any independent cause of action for the contention, that partially only there has been an abatement of the suit No independent claim could have originally been laid for future profits The abatement will therefore be of the entire suit and not partial A claim for past profits would stand on a different footing. This is not to say that the legal representative or heir cannot lay a claim to the profits that had accrued *pendente lite* if the right of possession does not survive As representing the estate and for the benefit of the estate, it will certainly be competent for him to claim the mesne profits that had accrued from the date of the suit till the death of the plaintiff What falls for decisions here is whether in a case where the action cannot be maintained for possession it could be continued as a claim for future mesne profits In my view it cannot be done

But the defendants in the lower appellate Court never put forward or pleaded abatement of the action either wholly or in part They readily consented to the 2nd defendant coming on record as the legal representative of the deceased-plaintiff and pursuing the action. There has been no decree by the trial Court The suit has been dismissed in its entirety, the findings being in favour of the contesting defendants The abatement of the action for possession in the case is glaring and so obtrusive that it cannot be ignored. How then comes it that there has been no objection to the continuance of the proceedings by the 2nd defendant? I am unable to ascribe it to ignorance Evidently, as surmised in the beginning, the defendants wanted to have the benefit of the findings given against the deceased by one Court and expected the confirmation of the said findings in the presence of the second defendant. The defendants wanted to take the chance of the adjudication being in their favour in appeal also. Having failed in that, it is now contended that there could be no decree for possession of profits Even here, the only relevant ground with reference to this aspect of the matter is limited in its scope being coupled with the status of the second defendant, the contention being that the 2nd defendant is not entitled to any relief in the suit as the rights of the plaintiff under Exhibit A-2 terminated on her death and it had not been found that the 2nd defendant is the son of Arunachalam Pillai, the question having been left open No plea of abatement of the action itself is put forward in the memorandum of ground of appeal. If the defendants had objected to the continuance of the action by the second defendant it may be that he would have straightway instituted an independent suit asserting his rights as the remainderman entitled to possession of the property after the lifetime of the widow, uniting in the action his claim to profits that had accrued till her death as the heir and legal representative of the deceased The claim to profits may now be barred by limitation Of course, any Court under section 14 of the Limitation Act will exclude the time taken in these proceedings So far as the 2nd defendant is concerned, it must be held that he had been prosecuting the matter in good faith, as the defendants had no objection to his prosecuting the appeal further. They never questioned his right to further prosecute the appeal, as the legal representative of the deceased. In the circumstances, and as the enquiry as to mesne profits has, it is stated, not been taken up and completed, I do not see any serious harm or prejudice to the 2nd defendant in not permitting a patent irregularity to stand Two features of the case weigh with me for directing the 2nd defendant to an independent suit though the point was not taken in the lower Court Firstly, this is not a case where the profits have been determined and a decree passed The Court has directed the 2nd defendant to pursue his claim for profits by separate proceedings under Order 20, rule 12, Civil Procedure Code. It is stated from the Bar that on the failure of the appellant to comply with the conditions laid by this Court for stay of execution, the stay got dissolved and the second defendant on 25th April, 1964, took possession of the suit properties themselves in execution, reserving his claim to future profits. Secondly the second defendant has still to litigate and establish his title to the suit

properties as the remainderman, in question The Courts below have avoided determining the point whether he is the *santhathi* of Arunachalam Pillai and the deceased-plaintiff If there has been such a determination already, it would be a different matter If the dispute is persisted in multiplicity of proceedings cannot be avoided in the case. The enquiry as to mesne profits as I see it, may if claimed be elaborate The defendants deny their possession of some of the items of the suit properties As the claim to mesne profits due to the 2nd defendant as heir may also properly be combined with any suit in assertion of his rights as remainderman, and having regard *ex facie* to the availability of section 14 of the Limitation Act, I would relegate the second defendant to a separate suit with reference to the claim for profits accrued to the deceased, the only right he could have as the heir of the deceased-plaintiff

But quite properly in my view, in the circumstances of the case, there can be a declaration of the deceased Sivagami Ammal's plaintiff's right to the possession of the suit properties under the settlement brought about by her husband Arunachalam Pillai under the original of Exhibit A-2 The decree for possession is a consequence of the finding as to the validty of the settlement deed As the possession lasted only till her life, the action for possession abated. But a relief of declaration could enure to the benefit of her estate and so could be availed of by her legal heir even assuming that the suit was not instituted in representative capacity In the special circumstances of the case having regard to the attitude of the defendants in the lower appellate Court I think it is but just and proper that her estate should have the benefit at least of the finding, which the defendants had invited

In the result, clauses (1) and (3) of the decree of the lower appellate Court granting possession and providing for ascertainment of future mesne profits, shall stand deleted from the decree. The 2nd defendant will not be entitled to the relief of possession and future profits decreed The second defendant may institute an independent suit for the mesne profits to which he is entitled to, as the legal representative of the deceased-plaintiff In substitution of clause (1) of the decree, there shall be a decree declaring that the plaintiff Sivagami Ammal had title and right to the possession of the suit properties for her life under the original of the settlement deed Exhibit A-2, executed by her husband Arunchalam Pillai The rights of the second defendant for establishing his claim as the remainderman are reserved The order as to the costs made by the lower appellate Court shall in the circumstances stand. In this Court, the parties will bear their respective costs The decree of the lower appellate Court is modified and the Second Appeal is allowed to the extent above indicated. No leave.

V.S. ——— *Order accordingly*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR M. ANANTANARAYANAN, *Chief Justice* AND MR. JUSTICE M. NATESAN

H. P Kannan .. *Appellant**

v.

S. Muthiah Chettiar (decd.) and others .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960)*—Applicability of——Lease of vacant land—Erection of building by tenant—Suit by land lord for eviction in civil Court—Whether civil Court's jurisdiction ousted—Applicability of Rent Control Act*

Applying the ruling of the Supreme Court (C.A. Nos. 880 and 881 of 1967), it was held, that the landlord did not let out any building to the tenant It follows.

*L P A No 60 of 1964
C M P No 13049 of 1966. 9th September, 1968

that the defendants cannot rely upon the Madras Buildings (Lease and Rent Control) Act, 1960 to oust the jurisdiction of the civil Court to grant the plaintiff the relief of eviction (It was not disputed that the subject of the original demise was only land)

(On the facts of the case, the suit was remanded to the lower Court for disposal of the case under the provisions of the Madras City Tenants Protection Act).

It was further pointed out that the decisions reported in *Ramaswami Pathar* v *J.K Devasthanam*, (1963) 1 M L.J 60, *Palaniappa Chettiar* v *Vairavan Chettiar*, I.L.R (1963) Mad. 519 : (1963) 1 M L J 130 , *Palaniappa Chettiar* v *Babu Sahib*, (1964) 1 M.L.J. 110, have been held by the Supreme Court in C A Nos 880 and 881 of 1967 as not laying down the correct law

Appeal under clause 15 of the Letters Patent against the Decree and Judgment of the Honourable Mr Justice Veeraswami, dated 11th February, 1964, and passed in S A. No. 1064 of 1963, preferred to the High Court against the Decree of the Court of the Subordinate Judge, Mayuram in A.S. No. 7 of 1963 (O.S. No. 154 of 1961 District Munsif's Court, Mayuram).

C.M P. No. 13049 *of* 1966.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to direct the respondent to sell the site to the petitioners under section 9 of the Madras City Tenants Protection Act.

M Ramachandran, for Appellant.

T. R. Ramachandran, *M A Sathar Sayeed* and *A. Ramanathan*, for Respondents

The Judgment of the Court was delivered by

Natesan, J—In this case our learned brother Veeraswami, J , while allowing the Second Appeal, granted leave, as he felt himself bound by certain decisions of this Court which required re-consideration in the light of the *ratio decidendi* of the decision of the Supreme Court in *Dr K A. Dhairavawan* v *J R Thakur*[1] These decisions *Ramaswami Pathar* v *J K Devasthanam*[2], *Palaniappa Chettiar* v *Vairavan Chettiar*[3], and *Palamappa Chettiar* v *Babu Sahib*[4], have since been held by the Supreme Court in *A. R. Saley Mohamed Sait* v *Jaffer Mohamed Sait's Memorial Dispensary Charity*[5], as not laying down the correct law All that is necessary now is to apply the ruling of the Supreme Court to the facts of the present case and pass appropriate orders. For this it is necessary to set out briefly the facts leading to the dispute and the respective contentions of the parties.

The plaintiff in a suit for ejectment is the appellant before us The 1st defendant in this case, on the 15th April, 1950, under Exhibit- A-1, took on lease 33 cents of vacant land belonging to the plaintiff on a rent of Rs. 165 per year. The lease period expired on the 14th April, 1960 But possession of the land was not surrendered by the defendant to the plaintiff To the suit in ejectment by the plaintiff, various defences were raised *Inter alia*, it was contended that the lease intended superstructures being erected on the land, and that, therefore, the Madras Buildings (Lease and Rent Control) Act, 1960 applied to the case. There was also a plea that the Madras City Tenants Protection Act that had been extended to the area, would apply to the case, notwithstanding Madras Act XIII of 1960 which exempted non-residential buildings in the area from the operation of the Act. The trial Court overruled the defence and decreed the suit for possession, granting the defendant six months' time to vacate the premises. The decree of the trial Court was confirmed in Appeal. In Second Appeal, following the decisions of this Court above referred to, under which even though the subject-matter of a lease was a

1. (1958) S C J 1060 : (1959) S.C R 799 : A I.R 1958 S C. 789
2. (1963) 1 M L J 60.
3. (1963) 1 M L J 130 : I L R. (1963) Mad. 519.
4. (1964) 1 M L J 110.
5. C.A Nos. 880 and 881 of 1967.

vacant site, once a building was erected thereon the site became part of the building, the land and building becoming an integral whole making the lease of the site as one of the building also and attracting the provisions of the Madras Buildings (Lease and Rent Control) Act, our learned brother reversed the decrees and judgment of the Courts below and allowed the Second Appeal The aforesaid decisions of this Court, based their conclusion on an earlier decision of this Court in *Irani* v *Chidambaram Chettiar*[1] in the view that in *The Irani case*[1] what was leased was a vacant site. In *A R Saley Mohamed Sait* v *Jaffer Mohammad Sait's Memorial Dispensary Charity*[2] above referred to, the Supreme Court points out that what was let out in *The Irani case*[1] was not a vacant site, and that there were certain stalls and structures on the land leased which came within the definition of "building" in the Madras Buildings (Lease and Rent Control) Act then in force The Supreme Court remarks that, to determine whether the lease is of vacant land or a "building" within the meaning of the Madras Buildings (Lease and Rent Control) Act, we must take into account both the form and substance of the transaction Counsel before us did not question the applicability of the decision to the instant case It is not disputed that the subject of the original demise was only land The landlord did not let out any building to the tenant. It follows that the defendant cannot rely upon the Madras Buildings (Lease and Rent Control) Act, 1960 to oust the jurisdiction of the civil Court to grant the plaintiff the relief of eviction

But this does not conclude the case. It now transpires that in December, 1965 the Madras City Tenants Protection Act has been extended to the Municipal Town of Mayuram even in respect of non-residential buildings The defendants have, in their written statement, indicated that they would be entitled to the benefits conferred on tenants under the Madras City Tenants Protection Act In this Court in the Letters Patent Appeal, they have filed application C M P No 13049 of 1966 claiming the benefit conferred on tenants under section 9 of the Act. This petition for directions to the plaintiff to sell the site under section 9 of the Act has been presented in this Court on 21st November, 1966 The plaintiff has filed a counter affidavit contending *inter alia* that the petition is barred by limitation and being out of time it has to be rejected The option under section 9 of the Act is only one of the benefits conferred on tenants It is neither convenient nor desirable to examine in this Court whether any and if so what benefits or rights the defendants could claim under the Act. In the application of the Act it may become necessary to assess the value of the superstructures or that of the site It is better in the circumstances to remit the claims under the Madras City Tenants Protection Act for consideration and disposal by the Court of first instance, leaving it open to the parties to raise all available pleas in the matter of the applicability of the Act or any of the provisions therein to the case

In the result the decrees and judgments in the suit are set aside and the suit is remanded back to the District Munsif, Mayuram, for disposal of the case under the provisions of the Madras City Tenants Protection Act C M P No 13049 of 1966 is also sent to the District Munsif for disposal there The date of presentation of the petition specifically for relief under section 9 of the Act shall be the date on which the petition was presented in this Court and the trial Court will consider its maintainability having regard to that date. Parties shall bear their respective costs throughout

S V J *Remanded.*

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1. (1952) 2 M.L.J. 221.

2. C A Nos. 880 and 881 of 1967.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. VENKATARAMAN.

M. A. A. Raoof .. *Appellant* *

v.

K. G. Lakshmipathi . *Respondent.*

Civil Procedure Code (V of 1908), section 51 and Order 21, rule 46—Attachment of shares—Shares in the custody of Judgment-debtor—Judgment-debtor residing within the jurisdiction of executing Court—Place of business of company outside jurisdiction of executing Court—Jurisdiction of executing Court to order attachment of shares—Situs of shares.

It is section 51, Civil Procedure Code, which gives the jurisdiction to the Court to attach and sell the shares and therefore the question whether the City Civil Court had jurisdiction to attach the shares must be determined primarily with reference to this section. Order 21, rule 46, Civil Procedure Code, only prescribes the mode of attachment, though the provisions thereof may have to be borne in mind in determining the question of jurisdiction. The principle obviously underlying section 51 (*b*), Civil Procedure Code, is that, if the property sought to be attached is within the limits of the jurisdiction of the Court, the Court can attach and sell the property. That is reinforced by the provisions of sections 39 and 46, Civil Procedure Code, which provide for the transfer of the decree to a Court within whose limits the property sought to be attached and sold is situate. Applying this criterion, since the properties sought to be attached and sold are the shares of the judgment-debtor and they are with him in Madras within the limits of the jurisdiction of the City Civil Court, it would follow without further more that that Court had the jurisdiction at attach and sell. There is nothing in Order 21, rule 46, Civil Procedure Code, to contradict this result and under Order 21, rule 46, Civil Procedure Code also, the criterior would seem to be only the residence of the judgment-debtor against whom prohibitory order is to be made from transferring the shares or receiving any dividedd therefrom.

The provisions laid down in Order 21, rule 46, Civil Procedure Code, in the case of attachment of a share is materially different from the provision relating to a debt. In the case of a debt, the prohibitory order should to be issued both to the creditor (prohibiting him from recovering the debt) and to the debtor prohibiting him from making the payment) and therefore there may be reason for holding that, unless both the creditor and the debtor reside within the jurisdiction of the executing Court, the executing Court would have no jurisdiction to issue the prohibitory order. But in the case of attachment of a share sub-rule (1) requires the prohibitory order to be issued only to the person in whose name the share stands and therefore it is enough if that person (judgment-debtor) resides within the jurisdiction of the executing Court. Though sub-rule (1) makes a distinction between the three classes, namely, a debt, a share and other moveable property and prescribes a separate procedure for each, sub-rule (2) clubs them all together in respect of affixture or despatch of the copy of the prohibitory order. That again would seem to indicate that sub-rule (2) is only an ancillary provision and that the main provision is sub-rule (1) on the question of jurisdiction.

There is some analogy between a mortgage deed and shares in a Corporation and the situs of the shares is the place where the shares are held by the judgment-debtor.

Held, the executing Court had jurisdiction to issue the attachment warrant.

Appeal against the order of the City Civil Court (IV Assistant Judge) Madras, dated 3rd February, 1967, and made in E.P. No. 1458 of 1966 in O.S. No. 2344 of 1960.

* A.A.O. No. 134 of 1967. 9th July, 1968.

K. N. Subramanyam, for Appellant.

V. Shyamalam, for Respondent.

The Court made the following

ORDER.—This appeal raises an interesting question of the validity of attachment of certain shares belonging to the judgment-debtor. The decree-holder Lakshmipathi obtained a decree in O.S. No. 2344 of 1960 on the file of the City Civil Court by consent. He filed E.P. No. 1458 of 1966 to recover a sum of Rs. 8,000 odd by attachment and sale of the shares which the judgment-debtor Raoof held in a company called Intrac Pharmaceutical (Private) Limited, Industrial Estate, Ambattur. An interim prohibitory order was issued both to the judgment-debtor and to the company. The company did not appear and object. The judgment-debtor appeared and took time to file a counter. He did not file the counter in time and so the attachment was made absolute. Against that order he has filed the present appeal.

The point taken on behalf of the appellant by his learned Counsel Sri K. N. Subramanian is that, though the judgment-debtor Raoof lives within the jurisdiction of the City Civil Court, Madras and the shares also are with him, the City Civil Court had no jurisdiction to issue the prohibitory order, because the place of business of the company is Ambattur, outside the jurisdiction of the City Civil Court, and the dividend due on the shares is also payable only at Ambattur. In my opinion this contention is not sound. Section 51 (*b*), Civil Procedure Code, states that subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree by attachment and sale or by sale without attachment of any property. Order 21, rule 46 prescribes the mode of attachment. It is necessary to quote it in full:

"46 (1). In the case of—

(*a*) a debt not secured by a negotiable instrument,

(*b*) a share in the Capital of a corporation,

(*c*) other moveable property not in the possession of the judgment-debtor, except property deposited in, or in the custody of, any Court,

the attachment shall be made by a written order prohibiting—

(*i*) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court;

(*ii*) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon;

(*iii*) in the case of the other moveable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

(2) A copy of such order shall be affixed on some conspicuous part of the Court-house and another copy shall be sent in the case of the debt, to the debtor, in the case of the share, to the proper officer of the Corporation, and, in the case of the other moveable property (except as aforesaid) to the person in possession of the same.

(3) A debtor prohibited under clause (*i*) of sub-rule (1) may pay the amount of his debt into Court and such payment shall discharge him as effectually as payment to the party entitled to receive the same."

It is section 51, Civil Procedure Code, which gives the jurisdiction to the Court to attach and sell the shares and therefore the question whether the City Civil Court had jurisdiction to attach the shares must be determined primarily with reference to this section. Order 21, rule 46, Civil Procedure Code, only prescribes the mode of attachment, though the provisions thereof may have to be borne in mind in determining the question of jurisdiction. The principle obviously underlying sec-

tion 51 (*b*), Civil Procedure Code, is that, if the property sought to be attached is within the limits of the jurisdiction of the Court, the Court can attach and sell the property That is reinforced by the provisions of sections 39 and 46, Civil Procedure Code, which provide for the transfer of the decree to a Court within whose limits the property sought to be attached and sold is situate Applying this criterion, since the properties sought to be attached and sold are the shares of the judgment debtor and they are with him in Madras within the limits of the jurisdiction of the City Civil Court, it would follow without further more that that Court had the jurisdiction to attach and sell It is only necessary to add that there is nothing in Order 21, rule 46, Civil Procedure Code, to contradict this result and I might go further and say that under Order 21, rule 46, Civil Procedure Code, also, the criterion would seem to be only the residence of the judgment-debtor against whom prohibitory order is to be made from transferring the shares or receiving any dividend therefrom That is all sub-rule (1) of rule 46 indicates It may be noted that sub-rule (2) of rule 46 only requires that a copy of the prohibitory order shall be affixed on some conspicuous part of the Court house and another copy to be sent to the proper officer of the Corporation In other words, the provision, which would seem to determine the question of jurisdiction, with which we are concerned, is only sub-rule (1) it would be sufficient if the judgment-debtor, in whose name the shares stand and to whom the prohibitory order is issued, resides within the jurisdiction of the executing Court Affixture of a copy of the prohibitory order on some conspicuous part of the Court-house and service of the copy of the order on the proper officer of the Corporation under sub-rule (2) are only additional formalities to be observed by the executing Court, but they are not determinative of the question as to which Court, has jurisdiction to issue the prohibitory order

Sri K. N Subramaniam, learned Counsel for the appellant however, relies on the decision of Mockett, J in *Baluswami* v. *Official Assignee of Madras*[1]. There some persons had been adjudged insolvents in this Court and against whom a decree had been obtained by the Obla K Ramasamier That decree itself was attached by one C S Varadachariar in execution of a decree in suit O S No 97 of 1930 in the Madurai Sub-Court The learned Subordinate Judge issued the prohibitory order to the Official Assignee of Madras prohibiting him from paying over the dividend due in respect of the decretal debt to anybody other than the attaching decree-holder C S Varadachariar Objection was taken to this course by the Official Assignee on the ground that the Sub-Judge at Madurai had no jurisdiction to issue such a prohibitory order against the Official Assignee not resident within his jurisdiction and in respect of the dividends payable at Madras, which again was outside the jurisdiction of the learned Subordinate Judge Mockett, J, upheld this objection and quoted Order 21, rule 46, Civil Procedure Code, laying down that the attachment should be made by a written order prohibiting in the case of the debt the creditor from recovering the debt *and the debtor from making payment thereof until further orders of the Court* It meant, according to the learned Judge, that the Court in order to have jurisdiction must also have jurisdiction against the debtor so as to make the order prohibiting him from making the payment. In other words, according to the learned Judge, it was necessary that the debtor should be within the jurisdiction of the Court In that case the debtor was the insolvent or rather the Official Assignee representing him, and he was not within the jurisdiction of the Sub-Court. No doubt the creditor (the original decree-holder Obla K Ramasamier) was within the jurisdiction of the Subordinate Judge but that only satisfied the first limb of the provision in question. Such was the reasoning of the learned Judge.

It will be seen that the provision laid down in Order 21, rule 46, Civil Procedure Code, in the case of attachment of a share is materially different from the provision relating to a debt In the case of a debt, the prohibitory order should be issued both to the creditor (prohibiting him from recovering the debt) and to the debtor (prohibiting him from making the payment) and therefore there may be reason for

1. (1939) M.W N. 573

holding that, unless both the creditor and the debtor reside within the jurisdiction of the executing Court, the executing Court would have no jurisdiction to issue the prohibitory order But in the case of attachment of a share sub-rule (1) requires the prohibitory order to be issued only to the person in whose name the shares stand and therefore it is enough if that person (the judgment-debtor) resides within the jurisdiction of the executing Court. It may be noted that whereas sub-rule (1) makes a distinction between the three classes, namely, a debt, a share and other moveable property and prescribes a separate procedure for each, sub-rule (2) clubs them all together in respect of the affixture or despatch of the copy of the prohibitory order. That again would seem to indicate that sub-rule (2) is only an ancillary provision and that the main provision is sub-rule (1) on the question of jurisdiction.

Sri K. N. Subramaniam has not been able to cite any other decision to controvert the view which I have taken in respect of shares Shri V Shyamalam, learned Counsel for the decree-holder has not been able to cite any direct case on the point, but the case which he has cited supports the view which I have taken The case is *The British Transport Company Limited, Delhi* v *Suraj Bhan and others*[1] There one Suraj Bhan had obtained a money decree against one Sardar Singh and filed the execution petition in the Court at Agra by attaching *inter alia* an amount alleged to be payable to the judgment-debtor Sardar Singh by the appellant British Transport Company Limited, Delhi The British Transport Company Limited, Delhi had taken on lease some buses belonging to Sardar Singh and was liable to pay for Sardar Singh's share Rs 4 per day as rent It was the total of such amounts that was sought to be attached It was held that the rent was payable at Agra and therefore the debt was due to the judgment-debtor at Agra The British Transport Company Limited, Delhi, however, took objection to the jurisdiction of the executing Court on the ground that they were residents at Delhi, outside the limits of the Agra Court Their objection was repelled by the Court and it was held that under section 51 (*b*), Civil Procedure Code, since what was sought to be attached was a debt its situs alone determined the jurisdiction, and since the debt was payable at Agra it was the Agra Court, which had jurisdiction It was pointed out that it was not the situs of the debtor (The British Transport Company Limited, Delhi) that determined the question of jurisdiction It was observed further that the mere circumstance that under Order 21, rule 46 Civil Procedure Code notice had to go to the debtor (garnishee) at Delhi outside the jurisdiction of the Court was immaterial. By way of analogy it was pointed out that even in the case of a regular suit, the Court may be properly seized of the suit on account of the accrual of the cause of action within the Court's limits and the defendants may be residing outside the jurisdiction, but that would not oust the jurisdiction The learned Judges distinguished the Bench decision of the Calcutta High Court in *Begg Dunlop and Company* v *Jagannath Marwari*[2] as a case where the executing Court was held not to have jurisdiction, because the debt due from the garnishee was itself not payable within the limits of the jurisdiction of the executing Court besides the circumstances of the garnishee being outside the jurisdiction of the Court. Some further inconveniences by adopting the contrary view were also pointed out It may be noted that the case of *Baluswami* v *Official Assignee of Madras*[3] also was similar to *Begg Dunlop and Company* v. *Jagannath Marwari*[2]. In that case the garnishee (Official Assignee) resided outside the jurisdiction of the sub-Court and the debt also was payable outside the jurisdiction of the Sub-Court However, if an occasion should arise, we may have to consider further how far the reasoning in *The British Transport Company Limited, Delhi* v *Suraj Bhan and others*[1] is in conflict with the decision of Mockett, J, and which view is correct. But the point on which the decision of the Allahabad High Court seems to help us is in the proposition that section 51 (*b*), Civil Procedure Code is primarily determinative of the jurisdiction, and whatever may be said about the case of a debt, the position is clear so far as a share in a company is concerned, both under section 51 (*b*) and under Order 21, rule 46, Civil Procedure Code.

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1 I.L.R. (1962) 2 All. 475 : A I R 1963 All 313.

2. (1912) I L R 39 Cal 104

3. (1939) M W N 573

Sri V Shyamalam cited also the decision of the Andhra Pradesh High Court in *Jhimandas Mathuram* v *Messers Mahadevappa Firm* [1] But as I understand that case it is an authority only on a question arising under Order 38, rule 5, Civil Procedure Code, namely that an attachment before judgment could be issued even in respect of property lying outside the territorial limits of the jurisdiction of the Court in a suitable case That is because of the special wording of Order 38, rule 5 The decision is not an authority in respect of an executing Court in view of the remarks in the concluding portion of the judgment stating that section 46, Civil Procedure Code, governs only the attachment in execution of a decree and would not be pertinent in respect of attachment before judgment We are now dealing with an execution of a decree and section 46 would seem to apply and indicate that the criterion is the location of the property But I have pointed out that even according to that criterion the City Civil Court had jurisdicton, because the shares are in Madras

In *Dharamdhar Ray* v *P D Sethi* [2] in execution of a money decree obtained in the Court of the Sub-Judge at Asansol, an attachment was sought to be effected of a mortgage debt due to the judgment-debtor The judgment-debtor resided in Asansol limits and the mortgage deed was also with him But his mortgagor was outside the limits of Asansol and the mortgaged property also was outside those limits It was held that these circumstances did not affect the jurisdiction of the executing Court, which had jurisdiction, because the judgment-debtor was within the limits of Asansol and the mortgage documents were within those limits It was pointed out that the mortgage debt was a speciality debt and the rule applicable to a mortgage debt was that its situs was the location of the mortgage deed. It may be said that there is some analogy between a mortgage deed and shares in a Corporation and that the situs of the shares is the place where the shares are held by the judgment-debtor

The result of the discussion so far is that the executing Court had jurisdiction to issue the attachment warrant

Learned Counsel Sri K N Subramanian finally submits that only 170 out of 220 shares attached belonged to the judgment-debtor and that the remaining 50 shares belonged to another If the 50 shares stand in the name of somebody else, the executing Court had no jurisdiction to attach them as the property of the judgment-debtor This may be brought to the notice of the executing Court in due course. Subject to this the appeal is dismissed.

S.V J *Appeal dismissed*

1 (1961) 1 An W R 296 A I R 1961 Andh Pra 417

2 (1933) I L R 60 Cal 782

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. M ANANTANARAYANAN, *Chief Justice* AND MR JUSTICE M. NATESAN

Sinnaraj Pillai and others .. *Appellants**

v.

Ramayee Ammal and another *Respondents.*

Will—Hindus—Bequest—Joint tenancy—Terms and intention of the testator—Construction of the will

Succession Act (*XXXIX of* 1925), *sections* 106, 107, 108—*Scope.*

Co-owners—Prescription of title by one co-owner—Ouster

The testator bequeathed certain properties to his second wife and her only daughter who predeceased the testator. The plaintiff in the suit is a subsequently born daughter to the second wife and on the basis of a will left by her mother claimed the properties from the defendants, heirs of the testator by his first wife. The plaintiff's case rested on the basis of joint bequest in favour of the second wife and her deceased daughter, while the case of the defendants rested on the ground that on the death of the daughter, the defendants succeeded as tenants in common with the second wife in respect of the share of the daughter. The claim of the plaintiff was upheld in appeal by the High Court and hence the Letters Patent appeal by the defendants The will read as follows : " With view to avoid all disputes I give these properties to my wife for her maintenance and for my minor daughter for her stridhana seer and other expenses These two persons shall take absolutely and enjoy the same with powers of gift etc " On the construction of the will,

Held, The bequest in favour of the second wife and her daughter was not a joint estate The half share of the daughter lapsed and has to be treated as undisposed of. The heirs of the testator of the first wife would succeed to the half share.

It is well established that the principle of joint tenancy is unknown to Hindu Law, except in the case of joint property of a Hindu undivided family governed by the Mitakshara law, which under that law passes by survivorship But that does not mean there can never be a bequest to be taken by two persons jointly There can be a joint gift in favour of two persons even when the parties are Hindus. It all depends upon the intention of the testator as could be gathered from the language of the instrument and the surrounding circumstances

Though sections 106, 107 and 108 of the Indian Succession Act, occur under the chapter headed " Of construction of wills " in its effect it is not a rule of construction of a will, but a provision for devolution

On facts, the testator apprehensive of disputes, wanted to provide for his second wife and daughter and for *seer* and sridhana for the daughter, conferring absolute powers of alienation The legatees are to discharge the debts One item is given to a person who is to perform the funeral ceremonies of the second wife Here the testator expects both his junior wife and daughter to outlive him and take the bequest. He expects his dauhgter to be married away and provided with *seer* and sridhana The intention of the testator may be defeated, if the principle of joint tenancy should be applied to the bequest

Also held, a tenant-in-common will not be permitted to claim the protection of the statute of limitation and plead acquisition of title by prescription, against his co-tenant, unless it clearly appears that he has repudiated the title of his co-tenant and has been holding adversely to him for the statutory period Exclusive possession by one co-tenant being consistent with the subsistence of the tenancy-in-com-

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* L P A No 97 of 1964 24th August, 1967

mon, to be adverse there must be outward acts of exclusive ownership or possession hostile to the tenant-in-common.

On facts, a finding was called for on the question whether the second wife had perfected her title to the half share bequeated to the daughter by ouster and adverse possession

Case-law discussed Unreported decision in A S No. 84 of 1957 referred

Appeal under clause 15, Letters Patent, against the Decree of Srinivasan, J., in S.A. No 15 of 1962

T. P. Gopalakrishnan, for Appellants.

U. Somasundaram and *R Bhoominathan*, for Respondents

The Court made the following

ORDER —This is a Letters Patent Appeal from the decision of our learned brother Srinivasan, J , and is preferred by the defenants in a suit relating to certain landed properties praying for permanent injunction or in the alternative for possession with future profits. The claim of the plaintiffs is rested on two wills, one dated 7th April, 1934, and the other dated 5th March, 1940, the latter by the person claiming the entirety of the properties under the earlier will The decree of the trial Court accepting the plaintiffs' claim and giving them possession, was confirmed on appeal by the learned Subordinate Judge, Dindigul, and has been affirmed in Second Appeal in this Court The plaintiffs have been awarded future mesne profits to be determined under Order 20, rule 12, Civil Procedure Code.

The principal questions that arise for consideration are the interpretation of the will dated 7th April, 1934, and the true scope and effect, if any, of sections 106 and 107 of the Indian Succession Act (XXXIX of 1925), in relation to that will The suit properties, a tope, originally belonged to one Chinnathambia Pillai and he left the will dated 7th April, 1934, a registered instrument, bequeathing certain properties including the suit properties to his second wife Meenakshi Ammal and her only daughter Muthammal The daughter Muthammal predeceased the testator—she died on 28th March, 1936. The testator died on 4th November, 1936 The first plaintiff in the suit is a subsequently born daughter of the testator by the second wife Meenakshi Ammal and the second plaintiff in the suit is her lessee Defendants 1 to 4 in the suit are sons of one Arunachalam, deceased son of the testator by his first wife Prior to his will the testator had divided himself away from his son Arunachalam and they were living separately, the properties comprised in the will being the separate properties of the testator It is the case of the plaintiffs that on the death of the testators, Meenakshi Ammal the second wife, entered into possession of all the properties, the subject-matter of the will, and continued in exclusive possession of the same till her death in 3rd May, 1959 It is claimed that she got patta for the properties transferred to her name Meenakshi Ammal left a will bequeathing the properties to her only surviving daughter, Ramayee, the first plaintiff The plaintiffs came to Court on the averment that after the first plaintiff entered into possession of the properties on the death of her mother and leased the suit properties to the second plaintiff, defendants 1 to 4 with the help of the other defendants attempted to trespass on the properties and prevented the enjoyment of the suit tope by the plaintiffs

The defence as it ultimately emerged is simple. It is urged for defendants that as Muthammal predeceased the testator, the half share of the estate in the legacy intended for her, fell into the residue of the testator's properties and Arunachalam, father of defendants 1 to 4, succeeded to the same as his father's heir in Hindu Law. They plead that Meenakshi Ammal and Arunachalam were in joint possession of the properties as tenants-in-common and the tenancy-in-common was continued after the death of Arunachalam between defendants 1 to 4 and Meenakshi Ammal, till her death on 3rd May, 1959. For the plaintiffs it is contended that the original bequest of Chinnathambia Pillai was a joint bequest in favour of his second wife

Meenakshi Ammal and his daughter Muthammal and that on the death of Muthammal. the second wife Meenakshi Ammal took the entire estate in terms of section 106 of the Indian Succession Act If the plea of joint bequest is upheld and section 106 applied there is no defence to the action The defendants have not pleaded any adverse possession and they conceded possession of Meenakshi Ammal till her death in 1959 The Courts below, and our learned brother, Srinivasan, J, in Second Appeal, have upheld the plaintiffs' contention that under the will Exhibit A-1 of Chinnathambia Pillai, the mother and the daughter took a joint estate resulting in the mother Meenakshi Ammal becoming the sole legatee of the entirety of the properties on the death of her daughter Muthammal It is this interpretation of the will that is the subject of challenge before us by Sri T P Gopalakrishnan, learned Counsel for the appellants

It will be convenient to set out first the material portions of the will. Broadly translated they are to this effect

> "With a view to avoid all disputes relating to these properties after my life-time and claims by others to the same, under the terms of this will I give these properties to my wife for her maintenance and for my minor daughter Muthammal for her *sridana seer* and other expenses After my life-time these two persons shall take items 1 and 2 hereunder absolutely and enjoy the same with powers of gift, sale, etc., they themselves discharging the debts specified hereunder. Neither of them shall have power to alienate the third item Whoever performs the obsequies of Meenakshi Ammal, shall take the same."

In our view, on the plain language of the will, it is difficult to hold that the legatees thereunder take as joint tenants with rights of survivorship between them. We are dealing with a testamentary disposition of a Hindu and we cannot readily import in the construction of his will that a gift under a will to two persons *ex facie* constitutes joint tenancy between them A gift of lands to two or more persons in joint tenancy is such a gift as imparts to them, with respect to all other persons than themelves, the properties of one single owner and the distinguishing feature of joint tenancy is the right of survivorship On the death of one joint tenant, his interest in the properties passes to the other joint tenants by survivorship and this process may continue until there is, but one survivor, who would then hold as sole tenant.

Section 106 of the Indian Succession Act which is relied upon for the plaintiffs is one of a fasciculus of sections dealing with the doctrine of lapse of legacies. We are concerned here, particularly with sections 105 to 108 and it is better they are set out:

> "*Section* 105 (1)—If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the will that the testator intended that it should go to some other person
>
> (2) In order to entitle the representative of the legatee to receive the legacy, it must be proved that he survived the testator
>
> *Section* 106 —If a legacy is given to two persons jointly, and one of them dies before the testator, the other legatees take the whole
>
> *Section* 107 —If a legacy is given to legatees in words which show that the testator intended to give them distinct shares of it, then, if any legatee dies before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property
>
> *Section* 108 —Where a share which lapses is a part of the general residue bequeathed by the will, that share shall go as undisposed of"

As the *Illustration* to section 106 is broadly relied upon, we are giving the same hereunder

> "The legacy is simply to *A* and *B* *A* dies before the testator *B* takes the legacy"

These provisions have been made applicable to Hindu under the 1925 Indian Succession Act The corresponding provisions for section 106 in the old Act is sec-

tion 93. The *Illustration* gives the presumption of English law that a gift to two persons with words of limitation *prima facie* constitutes a joint tenancy between them But there is no such presumption in the case of persons governed by Hindu law and the question for consideration is whether section 106 is a statutory provision making every gift or bequest to two persons a joint estate, that is, statutory and obligatory rule of construction or a provision against lapse of a legacy to the residue in the event of the estate granted on the interpretation of the testament in question being a joint estate, that is, does the section with its *Illustration* necessarily import the English idea of joint estate in the case of bequest to two persons irrespective of the interpretation, which the Court would ordinarily give to the will in question The reference to "two persons jointly" in section 106 of the Act obviously means a bequest to a plurality of persons and not just to two persons in the arithmetical sense In our view, the *Illustration* deals with a legacy simpliciter to *A* and *B* without anything more and so may not be helpful in construing the section The section speaks of a legacy given to two persons jointly and our reading is that if the testament when construed makes out that the legacy is given to two persons jointly, then on the death of one of the legatees before the testator his share therein does not fall or lapse into the residue, but the other legatee takes the entirety of the estate This section must be read along with section 107 and interpreted accordingly Section 107 deals with a case of legacy where the intention as brought out by the language of the will is to give the several legatees distinct shares therein Section 106 provides for cases where the testator intends the legatees to take the gift jointly The Court must, before it applies section 106, infer from the terms of the will an intention that the legatees should take the estate jointly with its incidents of survivorship Section 106 does not rule out the application of established rules in the matter of construction of wills The Court of construction will have to put itself so to say, in the testator's arm-chair and consider the will as a whole in the light of the circumstances attendant at the execution of the will Then it asks itself, what could he have intended circumstanced as he was The meaning of the words used what the words convey would depend upon their setting the class to which the testator belonged the religious and social influence, and the known practices, notions and wishes likely to be held by the testator with reference in his estate in the situation in which he was The words of a will are not used *in vacuo* Now it is well established that the principle of joint tenancy is unknown to Hindu Law, except in the case of the joint property of an undivided Hindu family governed by the Mitakshara law, which under that law passes by survivorship *Mt. Bahuram* v *Rajendra Baksy*[1]. In that case, there were grants made to two brothers and their heirs absolutely and the question was whether the grants were to the two brothers generally or as members of joint family Their Lordships of the Judicial Committee observed as follows :

> "In their Lordships' opinion this is a clear ruling that the principle of joint tenancy is unknown to Hindu Law except in the case of the joint property of an undivided Hindu family governed by the Mitakshara law which under that law passes by survivorship There could, therefore, be no question of the grants creating a joint tenancy as opposed to a tenancy-in-common, even if according to the English law, the terms of these instruments admitted of such a construction"

In *Jogeswar Narain Deo* v *Ramchandra Dutt*[2], the construction of a will of a Hindu testator whereby he bequeathed 4 annas share of a zamindari to his youngest widow and her son with power to them to alienate or sell the property bequeathed came up for consideration before the Judicial Committee The Zamindar had executed the will in the apprehension that the legatees, his youngest wife and her son, would be unable to live peaceably with his elder son and other members of the family after his death The question as to the interest which the two legatees took in the estate arose when the son after becoming a major, questioned the alienation made by his mother of the two annas share therein which she claimed as her own The contention that the mother and son became, in the sense of English law, joint tenants of

1 L R (1933) 60 I A 95 64 M L J 555 A I.R 1933 P C 72 at 75
2 (1896) I L.R 23 Cal. 670

the four annas share and not tenants-in-common was overruled by the Judicial Committee, observing that the Court would not be justified in importing into the construction of a Hindu will an extrem ly technical rule of English conveyancing They observed that the principle of joint tenancy appeared to be unknown to Hindu law except in the case of coparcenary between the members of an undivided family. This principle was affirmed by the Supreme Court recently in *Bhagwan* v. *Reotidevi*[1] But that does not mean that because the principle of joint tenancy is unknown to Hindu law outside the coparcenary, there can never be a bequest to be taken by two persons jointly. That there can be a gift of property even among Hindus to two persons to be held jointly outside the coparcenary, is clear from the pronouncement of the Privy Council in *Nandi Singh* v *Sitaram*[2] In that case, the last holder executed a deed of gift of the property, in dispute in favour of her daughter and her husband, that is, his son-in-law jointly It was an absolute gift and under the wazib-ul-arz which governed the succession in the case the gift in favour of son-in-law was invalid A contention was raised that for that reason, the whole gift failed Repelling the contention, the Judicial Committee observed .

"The gift is to the two donees jointly and in *Humphrey* v *Tayleur*[3] Lord Chancellor Hardwicke said, ' if an estate is limited to ' two jointly, the one capable of taking, the other not, he who 'is capable shall take the whole'. This principle does not depend upon any pecularity in English law and is applicable to this deed of gift "

It follows that there can be a joint gift in favour of two persons even when the parties are Hindus To such cases, section 106 will certainly be attracted It all depends upon the intention of the testator as could be gathered from the language of the instrument and the surrounding circumstances

The true scope of section 106 of the Indian Succession Act has been the subject of careful consideration by one of us in *Sanjeevi Reddi* v. *Ahilandathammal and Minor Radhna*[4] by Anantanarayanan, J , as he then was In that case there was extensive citation of the available authorities upon the problem of interpretation of the section and in the light of the decisions, it was observed therein as follows

" They (sections 106 and 108) are not really statutory rules of construction of Hindu wills, or of testamentary disposition in general They are rules which provide for a further devolution of an estate in one contingency, namely, where one of several legatees dies before the testator Section 106 provides for the devolution where the legacy is a joint legacy, in precisely the same manner Section 107 provides for the devolution where the legacy is a gift in severalty But it would lead to absurd results, and it would be logically fantastic if we apply section 106 or section 107 as the case may be, in such a manner as to involve the construction of a will in different terms from those upon which the will would be normally otherwise construed There are many decisions laying down the principle upon which wills should be construed by Courts and perhaps the most compendious statement of the criteria will be found in *Narasimha* v *Parthasarathy*[5], where the famous metaphor of " the armchair of the testator " has been used by the Judicial Committee But a will which is construed as a joint legacy, or as a legacy in severalty, as the circumstances may warrant, cannot be something else because one of the legatees happens to die before the testator I do not think that this line of reasoning can really be disputed It appears to me *per contra*, rather that we should first construe the terms of any will upon the general principles, and then proceed to apply section 106 or 107 as the case may be, to the specific contingency of the death of one of the legatees before the testator, which these sections seek to provide for "

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1 (1962) 1 S C J 348 (1962) 3 S C R 440 A I R 1962 S C 287

2 L R (1889) 16 I A 44 (1889) I L R 16 Cal 677

3 Ambeer 138

4 A S No 84 of 1957 (unreported)

5 (1914) I L R 37 Mad 199 L R. 41 I A 51 26 M L J 411 (P C).

The following cases *inter alia* had been cited then . *Vidyanada* v *Nagammal*[1], *Seshureddi* v *Mallareddi*[2], *Krishnaswami* v *Arayambal*[3], *Venkatakrishna* v. *Madamma*[4], *Janakiram Chettiar* v *Nagamani Mudaliar*[5], *Karuppai Nachiar* v *Sankaranarayana Chetti*[6], *Muthammal* v *Chandrakesa Udayar*[7], *Mt Jio* v *Mt. Ruturan*[8], *Deokali* v. *Ram Jag*[9], *Gopi* v *Mt. Jaldhara*[10], *Narasimha* v *Parthasarathy*[11], *Sura Reddi* v *Venkatasubba Reddy*[12] The decision point out that the observation in *Sura Reddi* v *Venkatasubba Reddy*[12], referring to section 106 as a rule to enable Courts in construing wills, does not convey the precise import of the section We may state that though this section occurs under the chapter headed "Of construction of wills" in its effect it is not a rule of construction of a will, but a provision for devolution

The further question about the requirement specified in section 107 for application of the section, that the " legacy is given to legatees in words which show that the testator intended to give them distinct shares of it" has also been discussed in the above unreported decision While Counsel in that case were agreed that sections 106 and 107 between themselves exhausted case of the death of a legatee before the testator in cases of joint gifts or gifts in severalty, an argument was raised that for section 107 there should be actual expressions in the will providing for the legatees taking in distinct shares and that the section did not warrant an inference that the legatees should take the shares in severalty by mere implication or interpretation. Learned Counsel had contended that if specific expression providing for the legatees taking distinct shares were not found in the will, there was no alternative, but to interpret the will as amounting to a joint gift and apply section 106 Dealing with this contention it was observed that the language of section 107 amounts to nothing more than this :

" Where, from the language employed in the will or gift, the inference is justified that it was a gift in severalty, thereby amounting to a tenancy-in-common and to distinct shares, then the principle applies, where one of the legatees died before the testator That is the permissible interpretation, for otherwise, we would be driven to conclude that there is a third case, a *medium quid* not provided for by these two sections, which is not the contention of either learned Counsel I do not think it can be seriously disputed that, in interpreting the terms of words of a will, or even of a statute, the entire text or body of the words has to be taken into consideration along with every essential implication arising from the particular language employed . ...I am of the view that section 107 merely employs language amounting to this, namely, that where, having regard to the dispositions and the surrounding circumstances, the inference is justified that the legacy was in severalty (which would necessarily be in distinct equal shares, unless unequal share were specified, the principle of the section would apply, in the case of death of a legatee before the testator "

We have heard no arguments to differ from the views then expressed

We shall now examine the will before us in the light of the above principles. We bear in mind that a Hindu testator is perfectly at liberty like any other testator to make a joint bequest in favour of two or more legatees and such a bequest can be inferred from the explicit language used, or from the language interpreted in the light of the surrounding circumstances, which justify a joint bequest as the only reasonable inference. In *Sura Reddi* v *Venkatasubba Reddy*[12] above referred to, it was *inter alia* observed :

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1 I.L.R (1888) 11 Mad 258.
2. A I R 1935 Mad 852
3. A I R 1933 Mad 204
4. A I R 1928 Mad 926
5 (1926) 50 M L J. 413 I L R 49 Mad 98
6. I.L R (1904) 27 Mad 300 : 13 M L J 398 (F B)
7 (1950) 63 L W 378
8 A I R 1927 Lah 126
9 A I R 1931 Oudh 421
10 I L R (1911) 33 All 41
11 (1914) 41 I A 51 26 M L J 411 : I L R. (1914) 37 Mad 199 (P C)
12 (1960) 1 An W R. 102

> " It cannot be postulated that whenever a gift is made to two or more persons jointly, they take it only as tenants-in-common irrespective of the intention of the donor. It all depends on the intention of the testator as could be gathered from the language of the instrument and the surrounding circumstances Such a construction does not in any way violate the principles of Hindu Law "

But we have to bear in mind that as pointed out in *Robertson* v. *Fraser*[1]:

> " Equity favours the construction that legatees were to take separate shares as tenants-in-common and hence the Court would utilise even a very slight indication of such an intention, to draw that inference "

In the present case, the testator is apprehensive that dispute may arise after his death between his son by his first wife, who had got himself divided and the junior wife and her minor daughter. He wants to provide for them and he wants to provide *seer* and *sridhana* for his minor daughter The legatees have been given absolute rights in the properties bequeathed with full powers of alienation by way of gift, sale, etc There were debts to be discharg d and the legatees have been enjoined to discharge them With reference to one of the items bequeathed, the third item, it is provided that neither of the legatees shall have the power to alienate that item and that the item should be taken by the person, who performed the funerals of the junior wife Here the testator expects both his junior wife and daughter to outlive him and take the bequest. He expects his daughter to be married away and provided with *seer* and *sridhana* It is manifest that the intention of the testator as disclosed in the above provisions may be defeated, if the principle of joint tenancy with its incident of *jus accrescendi* should be applied to the bequest Such an estate is unsuitable when we are concerned with beneficial owners like a Hindu widow and her unmarried minor daughter, who has to be married and provided with *sridhana* and *seer*, etc A joint bequest introduces an element of chance. Certainly the testator would not intend that after his death, should his daughter die joint but leaving her own son, the estate must survive to the widow In Megarry, the Law of Real Property, 2nd Edn at page 243, the position even in English law is stated as follows .

> "Even if there were no clear words of severance, the gift taken as a whole might show that a tenancy-in-common was intended. Thus provisions for the use of capital or income, or both, for the maintenance and advancement of those concerned created a tenancy-in-common. For example, if under a settlement on children containing such provisions as advance was made to one child, it would have to be debited against the child's share and this could not be done unless the child was a tenant-in-common and so had a distinct share."

In our view, the language of the will, interpreted in the light of the above principles, does not permit treating the bequest in favour of Meenakshi Ammal and Muthammal as a joint bequest bringing in its wake, section 106 of the Indian Succession Act. It follows that the half share of Muthammal in the properties bequeathed lapsed and has to be treated as undisposed of. The result is that on the testator's death, Arunachalam as the then heir of the properties of the testator succeeded to the half share. Arunachalam and Meenakshi Ammal became co-heirs in respect of the suit properties, Meenakshi Ammal as the legatee and Arunachalam as the heir-at-law.

But this finding of ours, differing from Srinivasan, J , and the Courts below, does not necessarily entail the dismissal of the suit, or the acceptance of the defence, the plaintiffs have further pleaded that on the death of Chinnathambia Pillai, Meenakshi Ammal considered herself to be entitled to the properties bequeathed to her and Muthammal, entered on the possession of the properties and perfected her title by adverse possession This plea of adverse possession was met by the defendants with the specific case that Arunachalam as the heir of Chinnathambia Pillai took possession of the properties jointly with Meenakshi Ammal and was in joint possession and enjoyment with her. It was pleaded that the plaintiff's mother and defen-

1 L R 6 Ch App 696.

dants 1 to 4 and their father Arunachalam had enjoyed the properties as tenants-in-common. On these pleas the trial Court raised the three following issues (*Issues* 1, 3 and 5) —

"*Issue* 1 :—Whether the plaintiff succeeded to the properties covered by the will as contended by the plaintiffs and whether the plaintiff's mother was in exclusive possession

Issue 3 —Whether the plaintiff's mother and defendants 1 to 4 and their father enjoyed suit property as tenants-in-common ? If so, whether the suit either for injunction or for possession is not maintainable ?

Issue 5 —Whether the plaintiff's mother had prescribed title by adverse possession ?"

Having held that the plaintiffs' mother had succeeded to the entirety of the properties covered by the will and the properties did not vest on Arunachalam and the plaintiffs' mother as tenants-in-common, the trial Court, examining the evidence regarding possession at some considerable length, concluded

"I find that the first plaintiff has proved that her mother was in exclusive possession for more than 12 years and the defendants 1 to 4 have not proved their joint possession."

The learned District Munsif points out that the defendants had not pleaded any adverse possession and only the plaintiffs had pleaded that they perfected their title by adverse possession He points out that he had already found that Arunachalam and defendants 1 to 4's father did not get any interest in the suit properties under the will Exhibit A-1 and, as such the question of joint possession by the defendants did not strictly arise in the case He was also not satisfied with the evidence of joint possession let in by the defendants On this he found the issues regarding adverse possession and prescription in favour of the plaintiffs The lower appellate Court even as the trial Court, rejected the case of the defendants that Arunachalam and Meenakshi Ammal and subsequently, Meenakshi Ammal and the first defendant jointly enjoyed the suit properties The appellate Court would hold that the evidence for the defendants on this aspect of the matter was thoroughly artificial and falsified by documentary evidence The lower appellate Court would hold in favour of the exclusive possession and enjoyment of the suit properties by Meenakshi Ammal and after her, by her daughter and it observed that this possession was adverse to Arunachalam and his heirs, namely, defendants 1 to 4, for over the statutory period It is found that defendants 1 to 4 never enjoyed the suit properties separately or jointly with Meenakshi Ammal In Second Appeal, the question of adverse possession and acquisition of title by prescription pleaded for the plaintiffs was not examined and there is just a passing observation, that even in the view that the bequest was several, admittedly the mother was in possession of what might be deemed to be the daughter's share of the property from the date of the testator's death till the date of suit and that any person claiming under Muthammal will obviously be affected by adverse possession But where is the question of anyone claiming under Muthammal, the daughter ? Muthammal having predeceased her father, her interest as legatee never vested in her for her to be fresh stock of descent The lower appellate Court has fallen into the same error, when it observed that the fact that Meenakshi Ammal and Muthammal succeeded to the properties as tenants-in-common did not affect the case because in its view on the death of Muthammal, her mother Meenakshi Ammal succeeded to the rights of Muthammal in the properties as the heir of Muthammal under Hindu Law

Learned Counsel for the appellants points out that the finding as to adverse possession found in the three judgments, no doubt, each concurring with the others, as it stands, cannot avail the plaintiffs Learned Counsel urges that in their approach to the question of adverse possession all the Courts have overlooked that the adverse possession or acquisition of title by prescription pleaded by the plaintiffs would not, once it is held that the legatees took as tenants-in-common, be against a stranger, but against a tenant-in-common. Now, while mere possession of a person without

any title may be adverse to the true owner possession being an indicia of title, mere exclusive possession would not do, to constitute adverse possession against a tenant-in-common No doubt the article of Limitation Act applicable even among tenants-in-common is the residuary Article 144 of the Limitation Act of 1908. But where the parties are co-owners, there is unity of possession, possession of the co-owner is possession of all the co-owners and for possession to become adverse, there must be something more than exclusive occupation, there must be as it is termed ouster The law as to what amounts to ouster or adverse possession between co-owners is well-settled A tenant-in-common will not be permitted to claim the protection of the statute of limitation and plead acquisition of title by prescription, against his co-tenant, unless it clearly appears that he has repudiated the title of his co-tenant and has been holding adversely to him for the statutory period. Exclusive possession by one co-tenant being consistent with the subsistence of the tenancy-in-common, to be adverse there must be outward acts of exclusive ownership or possession hostile to the tenants-in-common While the ultimate finding whether there is ouster or not is a matter for inference from facts and there can be no comprehensive formula to test whether the possession of a co-tenant in a particular case is adverse to the other co-tenant, when the plea is of adverse possession against a tenant-in-common the approach to the determination of the question is different The Court cannot be satisfied with mere exclusive possession of one tenant-in-common A tenant-in-common pleading ouster must establish that there was denial of the other co-owner's right in the properties, that the denial was sufficiently notorious and open, that the tenant-in-common out of possession should have got knowledge of it, and that the tenant-in-common in possession continued to enjoy the properties in repudiation of the rights of the other co-tenant in the properties for the statutory period (See *Jogendra Nath Roy* v *Baldeo Das*[1], *Krishnayya* v. *Udayalakshmamma*[2], *Jagannath Marwari* v *Smt Chandni Bibi*[3], *Lakshmi Reddi* v *Lakshmi Reddi*[4], *Peeran Sahib* v *Jamaldin Sahib*[5], *Palani Pillai* v *Ibrahim Rowther*[6], *Chenbasavana Gowd* v *Mahabaleswarappa*[7], *Ameer Bibi* v. *Chinnammal*[8]

It may be that the evidence recorded in this case when examined, would satisfy the test of ouster necessary to bar a co-tenant out of possession. If the original entry on the properties by Meenakshi Ammal on the death of her husband was to the knowledge of Arunachalam, as a person entitled to the entirety of the properties and Arunachalam had been kept out of possession and enjoyment, that may go a long way to establish ouster In that case the very entry on the properties is hostile It would become hostile and adverse even subsequently But in none of the judgments of the Courts below, do we see that the Court was conscious of the fact that it had to find ouster before it could hold that the co-tenants out of possession had lost their title by prescription The finding of the trial Court ultimately arrived at is that the first plaintiff and her mother had been in exclusive possession for more than twelve years and that defendants 1 to 4 had not proved their joint possession This by itself on the principles stated above will not do , the evidence has not been scanned to find if there was ouster Exclusive possession of one co-owner is not the same thing as hostile exclusion of the other co-tenant It is the latter that constitutes ouster, and makes possession adverse The judgments on appeal have not gone further and discussed the problem from the standpoint of the parties being tenants-in-common

But it is clear, that the parties knew what they were about, when the plaintiffs pleaded acquisition of title by prescription as an alternative to plea that the bequest was a joint one and the defendants sought to counter this by pleading joint enjoyment of the suit properties Only the Court's attention was not drawn to the fact,

1 I L R (1908) 35 Cal 961
2. (1953) 2 M L J 241
3 (1922) 26 Cal W N 65
4 (1957) S C J 248 (1957) 1 An W R (S C) 46 : (1957) 1 M L J (S C) 46 A I R 1957 S C 314.
5 A.I R. 1958 Andh. Pra 48.
6 (1942) 2 M L J 321 : I L R (1943) Mad 15
7 (1954) S C J 475 (1954) 1 M L J. 714 : A I R 1954 S C 337
8 (1967) 1 M L J 461 I L R (1968) 1 Mad. 533

that the plea of adverse possession came in the alternative and was on the basis of a tenancy-in-common and they must look for ouster, not just exclusive occupation. We think that in the interest of justice, the parties must be given an opportunity to agitate this question over again, letting in further evidence, if they consider necessary We would repeat that we are not finding against the plaintiff's plea of adverso possession against the defendants. The evidence even as it is may be sufficient to sustain the first plaintiff's acquisition of title by prescription, or it may be the other way. We do not go into the evidence, we say nothing on the merits, as it is a matter for the Court of fact to decide In fairness to the defendants they could not be concluded on a finding of loss of title by prescription, when the decision is given on a manifestly erroneous approach Having regard to the fact that the suit is of the year 1959, it is sufficient, if the subordinate Judge of Dindigul is asked to submit a fresh finding on the question.

"Whether Meenakshi Ammal had by the time of her death in 1959 perfected her title to the half share of Arunachalam in the suit properties by ouster and adverse possession?"

The parties may, if they have, let in further evidence on the question, and the Subordinate Judge will submit his finding on the evidence already on record and the additional evidence, if any tendered, in the light of the principles above set out within ten weeks from the receipt of the records Time for objection to the findings, if any, ten days.

V.S. *Finding called for*

[END OF VOLUME (1968) II M.L.J. (REPORTS)]